Supreme Court, U. S.
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In The

SUPREME COURT OF THE UNITED STATES

No. 77-1169

_____ Term, 1978

UNITED STATES OF AMERICA

vs.

JOHN BAZZANO, a/k/a "Johnny", a/k/a "J"

JOHN BAZZANO,
Petitioner

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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INDEX

	Page
Opinions Below	1
Jurisdiction	2
Question Presented	3
Constitutional Provision Involved	3
Statement	4
Reasons for Granting the Writ	9
Conclusion	20
Appendix A, Opinion, Court of Appeals for the Third Circuit, entered December 21, 1977	1a
Appendix B, Judgment Order, entered February 1, 1978	33a
Appendix C, Order, entered January 24, 1978, denying petition for rehearing	35a
Appendix D, Opinion and Order, November 9, 1976, United States District Court for the Western District of Pennsylvania at Criminal No. 75-192	37a

Appendix E, Excerpts, transcript of hearing on motions to suppress evidence, etc. - December 16, 1975..... 56a

Appendix F, Surety Bond..... 63a

CITATIONS

Brady v. State of Maryland, 373 U.S. 85, 83 S.Ct. 1196 (1963)..... 9, 10

Pyle v. Kansas, 317 U.S. 213, 215, 216, 63 S.Ct. 177, 178..... 18

United States ex rel. Almeida v. Baldy, 195 F.2d 815..... 17, 18

United States ex rel. Thompson v. Dye, 221 F.2d 763..... 18

Miscellaneous

American Bar Association, Project on Standards for Criminal Justice Relating to Discovery and Procedure Before Trial..... 10

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

John Bazzano petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

Opinions Below

The opinion of the Court of Appeals

for the Third Circuit entered December 21, 1977 is attached hereto as Appendix A, infra (p. 1a). The judgment order of the Court of Appeals for the Third Circuit, entered February 1, 1978, is attached hereto as Appendix B, infra (p. 33a). The order of the Court of Appeals denying the petition for rehearing, entered January 24, 1978, is attached hereto as Appendix C, infra (p. 35a). The opinion and order of the district court on defendant's motion for new trial, entered November 9, 1976, is attached hereto as Appendix D, infra (p. 37a).

Jurisdiction

The judgment of the court of appeals was entered on December 21, 1977 (App. A, infra, p. 1a). A petition for rehearing was denied on January 24, 1978 (App. B, infra, p. 33a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Question Presented

Where defense counsel demanded exculpatory material three and one-half months before trial, and the record discloses that defendant's $30,000.00 surety bond mandates that he not, directly or indirectly, attempt to contact certain named persons or "any other potential government witness", and when it appears that certain of the named witnesses, when called, have given exculpatory statements which were only delivered to defense counsel as Jencks material, has not petitioner set out a prima facie showing of prosecutorial misconduct in violation of due process so that the trial court should have held a hearing to determine what additional exculpatory material exists and, after hearing, granted petitioner's motion for a new trial or in arrest of judgment?

Constitutional Provision Involved

The constitutional provision involved is the Due Process of Law Clause of the Fifth Amendment as affected by

failure of prosecutors to produce any requested exculpatory material to defense counsel.

Statement

The prosecution in this case involved an eleven-count indictment charging various offenses against the United States in violation of 18 U.S.C. §§ 1955 and 2, and 18 U.S.C. § 1511. When the petitioner was arrested he was required to post bail in the amount of $30,000.00 with surety which contained a condition that petitioner not attempt to contact, directly or indirectly, certain named witnesses, all of whom were either indicted or named as unindicted alleged co-conspirators. Approximately three and one-half months before trial, at oral argument, counsel for petitioner demanded exculpatory material be delivered prior to trial for use in preparation of the defense. No exculpatory material was ever furnished by the government to counsel.

After trial, a verdict of guilty on counts three through eleven was returned and petitioner was sentenced to a term of seven years in prison and fined $40,000.00.

In his motion for new trial petitioner requested a hearing to establish the following uncontradicted facts:

1. One of the conditions of a $30,000.00 surety bond is that petitioner "shall not directly or indirectly attempt to contact Francisconi, Stanizzo, Moody, Pastore, Hammer, Mondich or any other potential government witness". (Appendix F, infra, p. 63a) Moody and Hammer testified and their Jencks material contained exculpatory statements. Pastore was deceased at the time of trial but many statements were attributed to him by the oral testimony of others.

2. On December 16, 1975, in open court, counsel for petitioner demanded all exculpatory material. (Appendix E, infra, p. 56a)

3. On March 9, 1976 the case went to trial and the jury returned a verdict on March 31, 1976 of guilty on counts three through eleven as to petitioner.

4. The witnesses Hammer, Moody, Mondich, Petrulli, Sevcik and Spernak were shown to have given exculpatory statements producible under Brady after they had testified but their statements were furnished as Jencks material.

5. No statements have been furnished to counsel for petitioner except for the witnesses who testified, on the representation of counsel for the government that it had no exculpatory statements even

though the statements of the named witnesses were clearly exculpatory.

6. The motion for new trial or in arrest of judgment requested a hearing so that the trial court could examine statements in government's file of persons indicted and allegedly involved with petitioner in the gambling business on the representation that such statements do exist and have been suppressed by the government and that such statements are in fact exculpatory.

7. Petitioner, in the motion for new trial, filed exhibits, being indictments in which petitioner was named as an unindicted co-conspirator and petitioner would have been able to establish that many witnesses were subpoenaed who were not called by the government and thus were "potential

witnesses" who petitioner was prohibited from contacting, directly or indirectly, under his $30,000.00 surety bond but who petitioner believes have given exculpatory statements to the government.

If a hearing had been held as requested by petitioner and the facts established as alleged by petitioner, government prosecutors would be shown to have refused to disgorge many FBI statements as well as grand jury transcripts of witnesses who the government alleged were part of petitioner's gambling business but who, in fact, had told the government that they were not engaged in petitioner's gambling business.

The district court erroneously concluded that since the government had denied the existence of exculpatory evidence, the defendant did not prove the existence of any material not known to him at the time of his Brady assertion and, therefore, a hearing where petitioner could have established the

improper conduct of government prosecutors was denied. The district court ignored the fact that the government's denial of the existence of exculpatory material flies in the face of the proved facts that such material did exist as to those witnesses called by the government and whose statements were furnished as Jencks material.

The court of appeals misapprehended the main argument of petitioner and dealt solely with sentencing and did not discuss the critical issue of the suppression of evidence by government counsel.

Reasons for Granting the Writ

The Fifth Amendment to the Constitution of the Uinted States assures every defendant in a criminal case a right to due process as against the government of the United States. Brady v. State of Maryland, 373 U.S. 85, 83 S.Ct. 1196 (1963) held that due process is violated when a prosecutor fails to come forward with exculpatory material when requested.

In Brady, your Honorable Court held that:

> ". . . the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment, irrespective of the good faith or bad faith of the prosecution."

The duties of a prosecutor are clearly set forth in the American Bar Association Project on Standards for Criminal Justice Relating to Discovery and Procedure Before Trial. The said Standards, Part II, Disclosure to Accused, sets forth the prosecutor's obligations. The Standards have generally been accepted by this Honorable Court, the appellate courts and lower courts. Under the Standards, the prosecutor is obliged to disclose to defense counsel

> ". . . any material or information within his possession or control which tends to negate the guilt of the accused as to the offense charged or would tend to

> reduce his punishment therefor." (Subsection (c) of §2.1) (Emphasis added)

Under subsection (d) of the Standards, the prosecuting attorney's obligation to provide material or information which tends to negate the guilt of the accused includes such material information in possession or control of members of his staff and of any others who have participated in the investigation or evaluation of the case and who either regularly report or with reference to the particular case have reported to his office. The posture of the case in the trial court was as follows: the defendant, under condition of bond, could not, directly or indirectly, contact potential government witnesses and the government had subpoenaed many witnesses, including those named in the bond who the defendant was not to contact specifically. The government had to prove the jurisdictional facts of 18 U.S.C. § 1955(b)(ii), namely, that the alleged illegal gambling business involved five or more persons who conduct, finance, manage, supervise, direct or

own all or part of such business, and § 1955(b)(iii) that it has been or remains in substantially continuous operation for a period in excess of thrity days or has a gross revenue of $2,000.00 in any single day.

As part of the exhibit requesting a hearing in the court below, the indictments against others, in which John Bazzano was named as an unindicted co-conspirator, was presented to the trial court to demonstrate that these are potential witnesses who the government had intervewed or subpoenaed before grand juries. None of the government statements of these witnesses or the grand jury testimonry had been given to counsel for the petitioner except when labeled as Jencks material. Counsel for petitioner was then able to demonstrate that every Jencks statement given to counsel after a witness had testified was in fact Brady material. Since it was established that the government prosecutor had not given the defendant the Brady material and that the Jencks material was in fact Brady material,

counsel for defendant contended that a prima facie showing had been made a suppression of exculpatory evidence by the prosecution and other witnesses were named in the demand for hearing to establish that additional exculpatory evidence exists.

At the trial, the testimony of John Hammer, Andrew Moody, Victor Spernak, Philip Sevcik, Mike Petrulli and George Mandich required that the government furnish Jencks statements to the defendant. Each statement of each witness indicated that the witness knew of facts which would have established that John Bazzano was not in the illegal gambling business which was the main element of the crime charged. The County Detective Hammer had testified before the grand jury that the deceased alleged co-conspirator Stanizzo had told him that John Bazzano was no longer in the numbers business. If the government had not called Hammer, the defendant would not have known of the exculpatory evidence. After trial it was learned, and a hearing was requested on the issue,

that Mary Piccolo, Joseph Bordini and others were subpoenaed by the government to testify at the trial of the petitioner and that the grand jury and FBI statements of these and other "potential witnesses" named in other indictments contained exculpatory matter for the petitioner.

Brady establishes that the good or bad faith of the prosecution is immaterial in considering whether there is suppression of evidence favorable to an accused.

It was proposed to show to the trial court that the grand jury investigation was conducted by the same Assistant United States Attorney who prosecuted the case before the petit jury; that the same Assistant United States Attorney had worked closely with the FBI agent in charge of the investgation; that the same Assistant United States Attorney was present at a suppression hearing at which counsel for this petitioner demanded all exculpatory evidence be delivered prior to trial to assist in

the defense of the case; that the same Assistant United States Attorney has denied and to this date continues to deny that the government had any exculpatory evidence which the lower court accepted despite the clear showing through Jencks material that exculpatory evidence was contained in the grand jury testimony and FBI statements of such witnesses as were called at the trial. The Jencks material was furnished by the same Assistant United States Attorney who assured the court that the government had no Brady material.

Obviously, defense counsel has not had an opportunity to review the government files but at the juncture of the conclusion of the case in the trial court, statements required to be produced under Jencks established the breach of the prosecutorial duties of furnishing exculpatory material, or the inability to recognize exculpatory material which clearly and unequivocally would negate the guilt of the accused.

If sufficient other exculpatory material exists, it cannot be suppressed by the failure of the government to call other witnesses whose exculpatory statements would then have been given to counsel for the accused under the guise of Jencks material.

There are in government files statements of witnesses and co-defendants and unindicted co-conspirators in the three indictments in which the accused's name appears, either as a defendant or as an unindicted co-conspirator, which would tend to negate the guilt of this petitioner, either from a jurisdictional standpoint of less than five persons involved in the gambling business or in the fact that the petitioner himself is not engaged in an illegal enterprise regardless of number of persons and amount.

The failure of the trial court to allow a hearing to unravel the prosecutorial misconduct alleged is to effectively negate the application of Brady v. Maryland, by the exercise of the whim

or fantasy of the prosecutor as to what constitutes exculpatory material. It effectively permits the prosecutor to not call witnesses and thus not produce Jencks material, which is in fact Brady, and exculpatory. The issue is whether the constitutional guidelines set forth in Brady are to have any efficacy in criminal trials. If the trial court is affirmed in denying the hearing requested, and the Court of Appeals for the Third Circuit is affimed for failure to even comment on the flagrant prosecutorial misconduct demonstrated by the uncontroverted facts in the case, then prosecutors of the Department of Justice need no longer be concerned with whether they have carried out the mandate to comply with Brady or the duties set forth in the ABA Project on Standards for Criminal Justice Relating to Discovery and Procedure Before Trial.

The Court of Appeals for the Third Circuit and the trial court have not only negated Brady but ignored the holding of the Court of Appeals in United States ex rel. Almeida v. Baldy, 195

F.2d 815, and United States ex rel. Thompson v. Dye, 221 F.2d 763, which, in effect, held that the suppression of evidence favorable to an accused is itself sufficient to amount to a denial of due process.

In Pyle v. Kansas, 317 U.S. 213, 215, 216, 63 S.Ct. 177, 178, the rule expressed by your Honorable Court was:

> "Petitioner's papers are inexpertly drawn, but they do set forth allegations that his imprisonment resulted from perjured testimony, knowingly used by the State authorities to obtain his conviction, and from the deliberate suppression by those same authroities of evidence favorable to him. These allegations sufficiently charge a deprevation of rights guaranteed by the Federal Constitution, and, if proven, would entitle petitioner to release from his present custody. Mooney v. Holohan, 294 U.S. 103, 55 S.Ct. 340, 79 L.Ed. 791."

The bureaucratic files are locked. Only a hearing by the trial court could allow the illumination of public scrutiny to demonstrate that the inscription

on the walls of the Department of Justice, which states:

> "The United States wins its point whenever justice is done its citizens in the courts"

still applies to the Department of Justice and its Assistant United States Attorneys.

CONCLUSION

The government of the United States has obtained a conviction in this case without furnishing the petitioner with exculpatory evidence in its files. The denial that such evidence exists has been proved untrue by the statements of those witnesses called by the prosecution and given to the petitioner as Jencks material. A prima facie showing of suppression has been made but ignored by the lower courts. Certiorari should be granted to review the impact of the denial of due process to petitioner on the vitality of Brady and the duty of a government prosecutor under these facts.

Respectfully submitted,

HAROLD GONDELMAN

BASKIN, BOREMAN, WILNER
SACHS, GONDELMAN & CRAIG

Attorneys for Petitioner

APPENDIX A
OPINION
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 76-2584, 76-2585, 76-2586, 76-2587,
76-2588 and 76-2628

UNITED STATES OF AMERICA

v.

JOHN BAZZANO, JR. a/k/a "JOHNNY", a/k/a "J"
JOSEPH DE MARCO a/k/a "JOE"
JOSEPH CHARLES YIMIN a/k/a "BULL"
CHARLES PATRICKKELLINGTON
a/k/a "CHUCK"
FRANCIS DATTALO a/k/a "FRANK" a/k/a "HOG"
ATTILIO POLICASTRO a/k/a "FLAT TOP"
PRIMO VICTORY MOLLICO a/k/a "XG"
JOHN FRANKLIN MATZ a/k/a "JACK"
a/k/a "MAYOR"
DAVID RANKIN GUFFEY a/k/a "CHIEF"
a/k/a "CLAIRTON CHIEF"
JOHN REGIS WARD a/k/a "JP" a/k/a "WARD"
PETER PAUL ORSINI a/k/a "PETE"
a/k/a "PETE ORSI"
DOMINIC PAUL SERAPIGLIA
a/k/a WILSON CONSTABLE
THOMAS C. POLJAK a/k/a "ELIZ CHIEF"
GEORGE B. HINES a/k/a "ELIZ CONSTABLE"

John Bazzano, *Appellant in No. 76-2584*

David Rankin Guffey, *Appellant in No. 76-2585*

John Regis Ward, *Appellant in No. 76-2586*

Peter Paul Orsini, *Appellant in No. 76-2587*

Thomas C. Poljak, *Appellant in No. 76-2588*

John Franklin Matz, *Appellant in No. 76-2628*

(D.C. Crim. No. 75-192)

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Argued September 6, 1977

Before ADAMS, VAN DUSEN and HUNTER, *Circuit Judges*

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Attorneys for Appellee

OPINION OF THE COURT

(Filed December 21, 1977)

VAN DUSEN, *Circuit Judge.*

This appeal from judgments of conviction of six defendants raises two principal issues: (1) whether the district court erred in failing to grant a new trial because of prosecutorial misconduct in allowing the grand jury testimony of Government witness Moody to be read to Government witness Stanizzo and the grand jury testimony of Stanizzo to be read to Moody prior to trial, and (2) whether defendant Bazzano was denied the right to effective assistance of counsel with regard to sentencing because the district court failed to disclose published sentencing guidelines. After careful consideration, we have concluded that the contentions raised by the defendants do not justify reversal of the convictions.

I.

The defendants were convicted of operating an illegal gambling business [1] or aiding and abetting the operation of an illegal gambling business,[2] and conspiring to obstruct

1. 18 U.S.C. § 1955 provides in pertinent part:
"Prohibition of illegal gambling businesses

"(a) Whoever conducts, finances, manages, supervises, directs, or owns all or part of an illegal gambling business shall be fined not more than $20,000 or imprisoned not more than five years, or both.

"(b) As used in this section—

(1) 'illegal gambling business' means a gambling business which—

(i) is a violation of the law of a State or political subdivision in which it is conducted;

(ii) involves five or more persons who conduct, finance, manage, supervise, direct, or own all or part of such business; and

(iii) has been or remains in substantially continuous operation for a period in excess of thirty days or has a gross revenue of $2,000 in any single day.

"(2) 'gambling' includes but is not limited to pool-selling, bookmaking, maintaining slot machines, roulette wheels or dice tables, and conducting lotteries, policy, bolita or numbers games, or selling chances therein."

2. 18 U.S.C. § 2(a) provides:

"Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal."

state law enforcement relating to gambling.[3] The gambling business, a numbers game, was conducted in the towns of Clairton and Elizabeth, Pa. All the defendants who participated in the illegal gambling business, except Bazzano, were public officials.

The evidence adduced by the Government was voluminous and a brief summary of it will suffice. Basically, the evidence was of two types: adding machine tapes proven to be business records of the gambling operation, and testimony by a number of witnesses who had been involved in the gambling operation. The evidence established that Bazzano had run the gambling operation and that the other defendants accepted payments from the gambling operation in exchange for letting the operation continue without interference.

Mrs. Elizabeth Stanizzo, a former employee of the gambling operation, extensively detailed the illegal gam-

3. 18 U.S.C. § 1511 provides in pertinent part:

"Obstruction of State or local law enforcement

"(a) It shall be unlawful for two or more persons to conspire to obstruct the enforcement of the criminal laws of a State or political subdivision thereof, with the intent to facilitate an illegal gambling business if—

"(1) one or more of such persons does any act to effect the object of such a conspiracy;

"(2) one or more of such persons is an official or employee, elected, appointed, or otherwise, of such State or political subdivision; and

"(3) one or more of such persons conducts, finances, manages, supervises, directs, or owns all or part of an illegal gambling business.

"(b) As used in this section—

"(1) 'illegal gambling business' means a gambling business which—

(i) is a violation of the law of a State or political subdivision in which it is conducted;

(ii) involves five or more persons who conduct, finance, manage, supervise, direct, or own all or part of such business; and

(iii) has been or remains in substantially continuous operation for a period in excess of thirty days or has a gross revenue of $2,000 in any single day.

"(2) 'gambling' includes but is not limited to pool-selling, bookmaking, maintaining slot machines, roulette wheels, or dice tables, and conducting lotteries, policy, bolita or numbers games, or selling chances therein.

. . .

"(d) Whoever violates this section shall be punished by a fine of not more than $20,000 or imprisonment for not more than five years, or both."

bling business. Mrs. Stanizzo had known defendant Bazzano for 20 years, and her late husband had been Bazzano's partner in the business. She testified that Bazzano ran the gambling operation and that the other defendants received payments from the operation. Another witness, Moody, corroborated some of Mrs. Stanizzo's testimony. Moody, who for a time was part owner of the operation, testified that he had worked for Mr. Stanizzo in the business and that Mr. Stanizzo had dealt with Bazzano. A former Allegheny County detective, Hammer, testified that he had accepted protection payments from numbers writers in the Clairton area. His testimony also corroborated some of Mrs. Stanizzo's testimony.

Defendant Matz was the Mayor of Clairton. Testimony indicated that Matz allowed Bazzano to operate the numbers business in Clairton and that Matz received payment from one of Bazzano's employees. The adding machine tapes indicate that payments were made to "Mayor."

There was sufficient testimony to support the jury's verdicts convicting the other public official defendants as indicated in the footnote.[4]

II.

The charge of prosecutorial misconduct stems from a meeting between two witnesses, Moody and Stanizzo, and F.B.I. Agent Fitzpatrick, who had investigated the case.

4. Defendant Guffey was the Chief of Police of Clairton. While he held this office, no gambling arrests were made in Clairton. The tapes indicated that protection payments were made to "Chief Clairton."

Defendant Poljak was the Chief of Police of Elizabeth. There was testimony that the people operating the gambling business made payments to Poljak. The tapes indicated that payments were made to "Elizabeth Chief" and "Elizabeth Constable."

Defendant Ward was the Justice of the Peace of Clairton. The tapes indicated that payments were made to "Ward" and to "J. P." Testimony established that "J. P." referred to the Justice of the Peace of Clairton.

Defendant Peter Orsini was a Constable in Clairton. The tapes indicated that protection payments were made to "Pete," "Pete Orsini," and "Pete Orsi." Testimony established that one of the operators of the gambling operation directed an assistant to give an envelope to Orsini. He accepted it without comment.

When Moody, who was testifying under immunity, took the stand, he requested to speak with the judge in chambers. In chambers, with counsel present, Moody stated that a few days before he was to testify, Fitzpatrick read Moody's grand jury testimony to Mrs. Stanizzo and read Mrs. Stanizzo's grand jury testimony to Moody. Defense counsel immediately moved for a mistrial or, in the alternative, that both Moody and Mrs. Stanizzo "be dismissed as witnesses and not called by the government" (N.T. IX-63). The court denied the motions after oral arguments and Moody was allowed to testify.

On cross-examination, defense counsel questioned Moody about the meeting with Fitzpatrick. He testified that Fitzpatrick read selected pages of each witness' grand jury testimony in the presence of both witnesses (N.T. IX-133). He also testified that, in his opinion, Fitzpatrick "doctored" Moody's testimony with Mrs. Stanizzo's so that their stories would be the same (N.T. IX-133-34).

Mrs. Stanizzo was also cross-examined on this subject, and her account differed from Moody's. She testified that Fitzpatrick did not read any of her grand jury testimony, but, rather, told her that he did not have to read it to her because she knew what she had said. She testified that he read from some papers to Moody in her presence.

After Mrs. Stanizzo's testimony, the defendants moved that her testimony be stricken on the ground that the meeting with Fitzpatrick violated F.R. Crim. P. 6(e) and constituted prosecutorial misconduct. Defendants also moved for a dismissal of the indictment on the same grounds. The motions were denied. The defendants again press this argument in this court, claiming that the conduct in violation of Rule 6(e) denied them a fair trial.

We hold that at least some of the conduct testified to was prosecutorial misconduct violative of Rule 6(e), but that this conduct did not constitute reversible error.

F.R. Crim. P. 6(e) provides in part:

"Secrecy of Proceedings and Disclosure. Disclosure of matters occurring before the grand jury other than its deliberations and the vote of any juror may be made to the attorneys for the government for use in the performance of their duties. Otherwise a juror, attorney, interpreter, stenographer, operator of a recording device, or any typist who transcribes recorded testimony may disclose matters occurring before the grand jury only when so directed by the court preliminarily to or in connection with a judicial proceeding or when permitted by the court at the request of the defendant upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury. No obligation of secrecy may be imposed upon any person except in accordance with this rule."[5]

5. Rule 6(e) was amended on July 30, 1977, to read, in part, as follows:

"SECRECY OF PROCEEDINGS AND DISCLOSURE.—

"(1) GENERAL RULE.—A grand juror, an interpreter, a stenographer, an operator of a recording device, a typist who transcribes recorded testimony, an attorney for the Government, or any person to whom disclosure is made under paragraph 2(A)(ii) of this subdivision shall not disclose matters occurring before the grand jury, except as otherwise provided for in these rules. No obligation of secrecy may be imposed on any person except in accordance with this rule. A knowing violation of rule 6 may be punished as a contempt of court.

"(2) EXCEPTIONS.—

"(A) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury, other than its deliberations and the vote of any grand juror, may be made to—

(i) an attorney for the government for use in the performance of such attorney's duty; and

(ii) such government personnel as are deemed necessary by an attorney for the government to assist an attorney for the government in the performance of such attorney's duty to enforce Federal criminal law.

"(B) Any person to whom matters are disclosed under subparagraph (A)(ii) of this paragraph shall not utilize that grand jury material for any purpose other than assisting the attorney for the government in the performance of such attorney's duty to enforce Federal criminal law. An attorney for the government shall promptly provide the district court, before which was impaneled the grand jury whose material has been so disclosed, with the names of the persons to whom such disclosure has been made.

"(C) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury may also be made—

The language pertinent here is: "Disclosure . . . may be made to attorneys for the government for use in the performance of their duties" and an "attorney . . . may disclose matters . . . only when so directed by the court . . . ." Thus, we are faced with two questions: Did the Government attorney use the material in the performance of his duties? Did the Government attorney disclose matters without court direction?

In answering the first question, we need not decide the issue of whether it is proper for material to be disclosed to an F.B.I. agent working for the Government attorney. The 1977 amendment to Rule 6(e) was enacted to permit such disclosure.[6] Assuming, *arguendo*, that such a disclosure was proper under the earlier version of Rule 6(e) applicable here,[7] the F.B.I. agent cannot use the disclosed material in a manner which is not permissible for the Government attorney. The scope of authority of the F.B.I. agent, acting as an agent for the Government attor-

5. (Cont'd.)

(i) When so directed by a court preliminarily to or in connection with a judicial proceeding; or

(ii) when permitted by a court at the request of the defendant, upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury."

Pub. L. No. 95-78, 91 Stat. 319 (1977).

Of course, for purposes of this appeal, we must apply the rule as it existed at the time of trial and at the time the misconduct occurred.

6. See note 5, *supra*. See [1977] U.S. Code Cong. & Adm. News, 1479-82, for the legislative history of the amendment.

7. Neither party cites, nor does our research disclose, any decision under the original version of Rule 6(e) directly addressing the question of the propriety of disclosure of grand jury material by a United States Attorney to personnel of another Government agency helping him prepare for trial. The courts, however, have generally permitted disclosure to such personnel when they are assisting the United States Attorney in conducting a grand jury investigation and working under his supervision. See *Coson v. United States*, 533 F.2d 1119, 1120-21 (9th Cir. 1976); *United States v. Evans*, 526 F.2d 701, 707 (5th Cir.), *cert. denied*, 50 L. Ed. 2d 78 (1976); *United States v. Hoffa*, 349 F.2d 20, 43 (6th Cir. 1965), *aff'd*, 385 U.S. 293 (1966); *In re William H. Pflaumer & Sons, Inc.*, 53 F.R.D. 464, 475-77 (E.D. Pa. 1971); *United States v. Zirpolo*, 288 F. Supp. 993, 1015 (D. N.J. 1968), *rev'd on other grounds*, 450 F.2d 424 (3d Cir. 1970). The Eighth Circuit has required an order prior to disclosure even in these circumstances. *United States v. Universal Mfg. Co.*, 525 F.2d 808, 812-13 (8th Cir. 1975). The Third Circuit has held that it is improper to disclose grand jury material to another federal agency for use by that agency in civil proceedings to enforce an administrative order. *In re Grand Jury Proceedings*, 309 F.2d 440, 444 (3d Cir. 1962).

ney, is limited to the scope of authority of the Government attorney. *Cf.* Restatement of Agency, 2d, § 20. Apparently, in this case, if Moody's testimony was accurate, the Assistant United States Attorney, perhaps unknowingly, used the F.B.I. agent as a conduit to disclose the grand jury testimony of two of the Government witnesses to each other prior to trial.

The defendants do not object to the disclosure by the agent to a grand jury witness of that witness' testimony,[8] but the objection is to the verbatim disclosure of Mrs. Stanizzo's testimony to Moody, and vice versa, in an attempt to "shape" their trial testimony so that each witness' testimony will corroborate the other's. These facts are distinguishable from a pre-trial interview in which the prosecutor indicates to a witness in general terms the evidence which other witnesses may give. In this latter situation, the interview may be conducted without disclosure of specific statements made to the grand jury, and therefore Rule 6(e) would not be involved. Furthermore, when potential trial witnesses who testified before the grand jury are not identified by name, there is no violation of the purpose of Rule 6(e) to encourage witnesses to testify without fear of retaliation. *See, e.g., Pittsburgh Plate Glass Co. v. United States*, 360 U.S. 395, 400 (1959); *Posey v. United States*, 416 F.2d 545, 557 (5th Cir. 1969), *cert. denied*, 397 U.S. 946 (1970). Finally, such a pre-trial interview may simply serve to refresh a witness' memory rather than improperly to influence his testimony. As the Supreme Court has stated, "an attorney must respect the important ethical distinction between discussing testimony and seeking improperly to influence it." *Geders v. United States*, 425 U.S. 80, 90 n.3 (1976). Of course, at times the

8. The decided cases which we have found on this point approve the disclosure, prior to trial, to a witness of his grand jury testimony. *United States v. Heinze*, 361 F. Supp. 46, 57 (D. Del. 1973); *King v. Jones*, 319 F. Supp. 653, 657 (N.D. Ohio 1970); *United States v. American Radiator & Standard Sanitary Corp.*, 45 F.R.D. 477 (W.D. Pa. 1968). *See Bursey v. United States*, 466 F.2d 1059, 1081 (9th Cir. 1972); *United States v. Rosen*, 353 F.2d 523, 524 (2d Cir. 1965); *In re Russo*, 10 Crim. L. Rep. 2145, 2147 (C.D. Cal. 1971).

line between refreshing a witness' memory and seeking improperly to influence his testimony may be difficult to draw, and each case must be decided on its facts. We merely hold that on the particular facts of this case, if the agent read Moody's testimony verbatim to Mrs. Stanizzo in an attempt to "shape" Mrs. Stanizzo's trial testimony to coincide with Moody's, the agent's conduct fell on the impermissible side of the line. Therefore, on Moody's account, the Government attorney's use of grand jury material went beyond the proper use of that material in the performance of his duties.[9]

With regard to the second question (page 8 above), through the F.B.I. agent, the Government attorney disclosed grand jury testimony without court direction, if Moody's testimony was accurate. Therefore, the Government attorney, perhaps unknowingly, violated Rule 6(e). However, as noted below, there were credibility difficulties with Moody's testimony. Although we find the violation of Rule 6(e) as testified to by Moody improper, we do not think the defendants were denied a fair trial under the facts presented by this record.

First, Moody's and Mrs. Stanizzo's accounts of what occurred at the meeting with Fitzpatrick differed. Moody claimed that Fitzpatrick attempted to "doctor" the testimony and read each witness' testimony to the other wit-

9. We think the Code of Professional Responsibility and the ABA Standards Relating to the Prosecution Function are relevant to a prosecutor's duty in this context. Ethical Consideration 7-13 of the Code of Professional Responsibility states: "The responsibility of a public prosecutor differs from that of the usual advocate; his duty is to seek justice, not merely to convict." The commentary to the ABA Standards Relating to the Prosecution Function, Standard 1.1 at 45, states: "Although the prosecutor operates within the adversary system, it is fundamental that his obligation is to protect the innocent as well as to convict the guilty, to guard the rights of the accused as well as to enforce the rights of the public."

In *United States v. Crutchley*, 502 F.2d 1195 (3d Cir. 1974), which held that if the Government transcribes the grand jury testimony of any witness it must transcribe the testimony of all such witnesses, this court recognized the importance of preventing the grand jury system from being used in a way that puts the defense in an unequal position at trial. See *Crutchley, supra* at 1200. However, no restraint was placed on the cross-examination of Moody, Mrs. Stanizzo and Fitzpatrick (see, for example, N.T. X-45, etc.). See page 12, below.

ness. Mrs. Stanizzo testified that Fitzpatrick merely read from some papers, presumably a portion of Moody's testimony,[9a] to Moody in her presence, but made no attempt to coach her or to tell her what to say. Of course, even given Mrs. Stanizzo's version of the conduct if the papers read were grand jury transcripts, the conduct violates Rule 6(e), but on this version the conduct is not as egregious as the misconduct alleged by Moody. The trial judge could have believed Mrs. Stanizzo's account rather than Moody's, and we cannot say his decision to believe her account was erroneous. There is evidence in the record that Moody, who was being forced to testify under immunity, did not want to testify and was using this incident as a convenient way to avoid testifying and to avoid implicating his friends.[10] Throughout his testimony he exhibited a hostility toward the Government. N.T. IX-67, 109, 123. Consequently there is reason to be suspicious of the accuracy of Moody's account of the meeting and to accept Mrs. Stanizzo's account, as the fact finder could conclude that she was a more disinterested witness.

Secondly, the trial judge found that the witnesses' testimony "varied in a number of respects, and all the circumstances militate against any inference that the testi-

9a. Fitzpatrick testified that he "went over" Moody's testimony with him in Mrs. Stanizzo's presence and "went over" Mrs. Stanizzo's testimony with her in Moody's presence. N.T. X-45.

10. The following are excerpts from Moody's discussion in chambers and testimony:

"Your Honor, I don't want to get on the stand and testify." N.T. IX-57.

"I didn't want immunity."

Question (by Assistant U.S. Attorney): "Were you granted immunity?"

A: "Yes, against my rights."
Q: "And you were ordered to testify?"
A: "Yes, I was ordered to, either that or go to jail for 18 months." N.T. IX-66.

"I am not here of my own free will." N.T. IX-68.

"I will go to jail before I put any of these guys [the defendants] in jail." N.T. IX-141.

mony of Moody and Mrs. Stanizzo was 'shaped' . . . ." *United States v. Bazzano,* Crim. No. 75-192, slip op. at 8-9 (W.D. Pa., Nov. 9, 1976). Having carefully reviewed the record, we find ample support for this position. Thus, the trial judge was acting well within his discretion in allowing these witnesses to testify.

Third, because there is ample evidence to support the view that any attempt to shape the witnesses' testimony was unsuccessful, we think the evidence of improper influence affects the credibility, not the admissibility, of the testimony, see *Geders v. United States,* 425 U.S. 80, 89-90 (1976); *United States v. Hood,* 493 F.2d 677, 680 (9th Cir.), *cert. denied,* 419 U.S. 852 (1974), and, of course, the credibility of witnesses is a question for the jury. *See, e.g., United States v. Hill,* 449 F.2d 743, 743 n.3 (3d Cir. 1971). Moody, Mrs. Stanizzo, and Fitzpatrick were cross-examined vigorously about the meeting at which the grand jury testimony was read by Fitzpatrick. Therefore, the jury was fully apprised of all three accounts and was able to weigh the credibility of Mrs. Stanizzo accordingly.[11] As the Supreme Court has stated: "The established safeguards of the Anglo-American legal system leave the veracity of a witness to be tested by cross-examination, and the credibility of his testimony to be determined by a properly in-

11. *Geders, supra,* concerned the possibility of the "coaching" of a defendant by a defense counsel when the defendant testified in his own behalf. We think that the principles announced by the Court in that context are applicable here, where the issue concerns the possibility of improperly influencing a Government witness. The Court stated:

> "The opposing counsel in the adversary system is not without weapons to cope with 'coached' witnesses. A prosecutor may cross-examine a defendant as to the extent of any 'coaching' during a recess, subject, of course, to the control of the court. Skillful cross-examination could develop a record which the prosecutor in closing argument might well exploit by raising questions as to the defendant's credibility, if it developed that defense counsel had in fact coached the witness as to how to respond on the remaining direct examination and on cross-examination."

Id. at 89-90.

In *United States v. Hood,* 493 F.2d 677, 680 (9th Cir. 1974), the court held that where there was evidence that police officers testifying for the Government had fabricated their testimony, it was a function of the trier of fact to determine the credibility of these witnesses.

structed jury." *Hoffa v. United States,* 385 U.S. 293, 311 (1966).[12]

Finally, even assuming that Mrs. Stanizzo's testimony was tainted by improper influence, her testimony was still not sufficiently harmful to require reversal. The only defendant who attempts to show that he was prejudiced by Mrs. Stanizzo's testimony is Matz, who claims that he was implicated by her trial testimony but was not implicated by her grand jury testimony. Even if Mrs. Stanizzo's testimony regarding Matz had been stricken, there would have been sufficient evidence to convict Matz because the tapes indicated that he received bribes and there was ample evidence that whenever the tapes indicated that a person received bribes, that person did receive bribes. Therefore, even if it had been error to admit Mrs. Stanizzo's testimony regarding Matz, it would have been harmless error beyond a reasonable doubt.[13]

We emphasize that our holding that the prosecutorial misconduct in violation of Rule 6(e) does not require a new trial is limited to the facts of this case. Under other circumstances, for example, when a witness appears to have changed his or her testimony as the result of some improper influence or when the evidence against the defendants is not as strong as it is here, a violation of Rule 6(e) may well require a new trial.

III.

Defendant Bazzano contends that the district court denied him effective assistance of counsel during sentencing because the trial judge referred to published sentencing

12. See also *United States v. Henderson,* 422 F.2d 454, 456 (9th Cir. 1970) ("Where . . . the trial court allows the defendant broad latitude to probe the informant's background and motives by cross-examination, the question is one of credibility to be determined by the trier of fact."); *Bush v. United States,* 375 F.2d 602, 604 (D.C. Cir. 1967).

13. F.R. Crim. P. 52(a) provides: "Harmless Error. Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded." *See United States v. Baily,* 505 F.2d 417, 420 (D.C. Cir. 1974), *cert. denied,* 420 U.S. 961 (1975) (no harm caused by court's acceptance of evidence without preliminary ruling on admissibility when the evidence against the defendants was otherwise overwhelming).

guidelines but failed to provide those guidelines to defense counsel or to make them part of the record. We find this argument unpersuasive.

Counsel did not request to see the sentencing guidelines or to have them made part of the record at the time of sentencing. Nor did Bazzano raise the issue of ineffective assistance of counsel in his post-trial motions. This court will not pass on issues not raised in the district court "unless the error be so fundamental in nature as to deprive a party of fundamental justice." *United States v. Moore,* 453 F.2d 601, 604 (3d Cir. 1971).[14]

We do not think failure to disclose the sentencing guidelines deprived Bazzano of fundamental justice. Bazzano was sentenced to seven years' imprisonment and fined $40,000. The maximum sentence possible was 35 years' imprisonment and $140,000. in fines.[15] Therefore, the sentence was well within the statutory maximum. *See United States v. Fessler,* 453 F.2d 953, 954 (3d Cir. 1972). Moreover, the guidelines referred to by the trial judge, entitled Part 2—Parole, Release, Supervision and Recommitment of Prisoners, Youth Offenders and Juvenile Delinquents, are published at 28 C.F.R. §§ 2.1-2.58, and often cited by this court. *See, e.g., United States v. Somers,* 552 F.2d 108 (3d Cir. 1977); *United States v. Salerno* (appeal of Silverman), 538 F.2d 1005 (3d Cir. 1976).[16] Since the guidelines should be familiar to anyone practicing criminal

14. *See also United States v. Dansker,* 537 F.2d 40, 64 (3d Cir. 1976); *United States v. Provenzano,* 344 F.2d 678, 690 (3d Cir. 1964). F.R. Crim. P. 52(b) states: "Plain error or defects affecting substantial rights may be noted although they were not brought to the attention of the court."

15. Bazzano was convicted of one count of violating 18 U.S.C. § 1955, see note 1, *supra,* carrying a maximum sentence of five years' imprisonment and a $20,000. fine, and six counts of violating 18 U.S.C. § 1511, see note 3, *supra,* also carrying a maximum sentence of five years' imprisonment and a $20,000. fine for each count.

16. The guidelines were adopted in 1973 and amended effective May 5, 1976. See 41 Federal Register 19326 (1976). *Silverman, supra,* contains an extensive discussion of the guidelines. The guidelines were also applied by this Circuit in *Hill v. Attorney General of the United States,* 550 F.2d 901 (3d Cir. 1977). Other circuit courts of appeals also have discussed the guidelines extensively. See, *e.g., Ruip v. United States,* 555 F.2d 1331 (6th Cir. 1977); *Kills Crow v. United States,* 555 F.2d 183 (8th Cir. 1977); *Kortness v. United States,* 514 F.2d 167 (8th Cir. 1975).

law in this Circuit and since they have been published in the Code of Federal Regulations, they were readily available to defense counsel.

IV.

We have considered these other contentions of one or more defendants and reject them:

A. Where it is established that the prosecutor failed to furnish exculpatory statements of many witnesses who were called to testify, the district court should have conducted a hearing and required the production of statements and grand jury testimony of other witnesses whom the Government did not call to testify to determine whether additional exculpatory evidence or evidence which would tend to negate the guilt of defendant had been withheld from counsel for defendant as alleged in the motion for new trial.[17]

B. The district court erred in failing to instruct the jury that certain witnesses are available to the Government where the Government may grant them immunity but not available to the defendant and, therefore, the inference that their testimony would be adverse to the Government is a permissible one which the jury may draw.[18]

C. The district court erred in failing to grant a hearing at which the grand jury testimony of the F.B.I. agent would be introduced to show that the indictment was returned on hearsay rather than on substantive testimony of witnesses.[19]

D. The evidence is not sufficient to sustain the verdict and the court should have granted defendants' motion for judgment of acquittal.[20]

17. Brief for appellant Bazzano at 15.

18. *Id.* at 24.

19. *Id.* at 25.

20. This contention is made by all defendants except Bazzano. Brief for appellant Guffey at 19-23; brief for appellants Ward and Orsini at 2-12; brief for appellant Poljak at 11-12; brief for appellant Matz at 19-20.

E. The court erred in admitting into evidence the adding machine tapes which (1) consisted of inadmissible hearsay statements, and (2) denied the defendant his constitutional right to confront and cross-examine witnesses against him.[21]

The defendants make several other contentions which, after consideration, we also reject.[22]

The judgments of the district court will be affirmed.

21. This contention is raised by all the defendants except Bazzano and Poljak. Brief for appellant Guffey at 3-11; brief for appellants Ward and Orsini at 15-17; brief for appellant Matz at 9-10.

22. Guffey and Matz contend that the court erred in denying their motion for severance from prejudicial joinder. Brief for appellant Guffey at 12-18; brief for appellant Matz at 14-16. Ward, Orsini and Matz contend that a violation of the order sequestering witnesses prevented a fair trial. Brief for appellants Ward and Orsini at 13-15; brief for appellant Matz at 7. Ward and Orsini contend that the Government failed to prove specific charges and that the district court erred in failing to require the Government to elect between 18 U.S.C. § 1511 (see note 3, *supra*) and 18 U.S.C. § 1955 (see note 1, *supra*). Brief for appellants Ward and Orsini at 17-20. Poljak and Matz contend that the district court erred in admitting the hearsay testimony of F.B.I. Agent Fitzpatrick of a statement made by Gary Pastore, a deceased, alleged co-conspirator. Brief for appellant Poljak at 27-29; brief for appellant Matz at 8, 11-14. Poljak contends that the district court erred in refusing to dismiss the indictment at the conclusion of the Government's case, in failing to confer with defense counsel prior to answering the last question raised by the jury during its deliberations, and in refusing to grant the motion to suppress evidence obtained through an allegedly defective search warrant. Brief for appellant Poljak at 22-23. Matz contends that a new trial is required by prosecutorial misconduct before the jury, brief for appellant Matz at 8, that the court erred in failing to grant his motion for a continuance, *id.* at 4, and that "the cummulation of events" described below constitute unfairness requiring a new trial (*id.* at 17-18):

"1. He was required to stand trial in a complicated multi-defendant conspiracy case with counsel who had been appointed on the day that jury selection was to begin.

"2. He was prevented from securing the needed and desirable expert testimony because of the shortness of time.

"3. He was refused the right to be tried alone, despite the fact that most of the activities described by the prosecution testimony took place long after Matz could have been a part of the alleged conspiracy and after manifest prejudice in the joint trial became apparent.

"4. The witness who sponsored the tape exhibits and the witness who testified to an alleged payment were surreptitiously and unlawfully coached by the prosecution through the violation of the secrecy of the grand jury.

"5. The trial court admitted a hearsay declaration of the decedent Pastore which was made long after the time when Matz is accused of conspiring and in violation of the *Bruton* principle.

"6. The prosecutor intentionally abused the *Bruton* principle in the presence of the court and jury in attempting to place before the jury the Pastore statement concerning Matz.

"7. And the court failed or refused to recognize appellant's rights through the grant of post trial motions."

ADAMS, *Circuit Judge*, concurring.

I concur with the result reached by the majority in this case. However, I am constrained to add some thoughts concerning Bazzano's contention as to the sentence imposed on him, and the judge's alleged failure to explain the basis of that sentence.

I.

The key facts bearing upon Bazzano's sentencing may be quickly summarized. With respect to all counts on which he was convicted, Bazzano received a sentence of seven years in prison and a fine of $40,000. After the penalty was imposed, the trial judge stated that Bazzano's sentence was predicated upon the "guidelines that have recently been published."[1]

At oral argument Bazzano's counsel remarked that he was not aware of the identity of the guidelines to which the judge referred. After further questioning by the panel, however, counsel admitted that he had not pressed the trial judge for any additional explanation of the basis for the sentence.

Two points are evident in light of these facts. First, this is not a case in which the district judge gave no reasons for Bazzano's sentence. Although the grounds for the sentencing decision were not set forth in detail, it cannot be claimed that the judge made no attempt to explain the matters influencing him.

Additionally, there is no indication that Bazzano was foreclosed from requesting a further explanation by the

1. The guidelines to which the judge referred were not identified, although it seems likely that they were the guidelines adopted by the Parole Commission. *See* 28 C.F.R. §§ 2.1-2.58. *Cf.* Appellant's brief at p. 32, where a conjecture is made that the guidelines might have been the sentencing standards incorporated in a pending Senate bill. For a discussion of the bill's provisions, *see* Kennedy, *Criminal Sentencing: A Game of Chance*, 60 *Judicature* 208, 212-215 (December 1976).

As the majority properly points out, Bazzano made no attempt to ask the court to clear up any doubt regarding the nature of the guidelines applied in his case. He did not ask the district court for an explanation of the meaning of the term "guidelines" or for a statement of the reasons for his sentence.

court. Since Bazzano's counsel apparently was unaware of the nature of the guidelines to which the judge referred, it is rather puzzling that he did not seek some additional elaboration of the basis for the decision.

In light of these factors, Bazzano's argument that he was deprived of the effective assistance of counsel, because the attorney was unable to discover the grounds of the penalty,[2] cannot succeed. The facts simply do not support the major premise of such a position, namely, that counsel had no opportunity to learn the reasons for the sentencing determination.

Nonetheless, this does not end the matter. Although this Court was not asked by the parties to adopt a rule that the reasons for sentences should be given in all cases, in my view, the procedural requirement of a statement of reasons should be adopted for *future* cases.

II.

The traditional principle guiding appellate courts faced with challenges to sentences, in this Circuit and elsewhere, is to defer to the discretion of a trial court.[3] As a general rule, "a federal appellate tribunal will not review a judgment of sentence that is within the statutory maximum unless there be a showing of illegality or abuse of discretion."[4] The rationale behind this precept is that trial judges, by virtue of their knowledge of the circumstances of a criminal case, are in the best position to impose a

2. See appellant's brief at pp. 31-32. Bazzano claims that the "guidelines" should have been made available to him. Yet his counsel was not precluded from requesting them, and thus it is not now appropriate for Bazzano to complain about the fact that the judge did not articulate more fully the reasons for the sentence.

3. *See* United States v. Tucker, 404 U.S. 443, 446-447 (1972); Gore v. United States, 357 U.S. 386, 393 (1958); Townsend v. Burke, 334 U.S. 736 (1948); Blockburger v. United States, 284 U.S. 290, 305 (1932).

4. United States v. Fessler, 453 F.2d 953, 954 (3d Cir. 1972). *See also* United States v. Lee, 532 F.2d 911, 916 (3d Cir. 1976); Government of Virgin Islands v. Richardson, 498 F.2d 892, 894 (3d Cir. 1974).

penalty, taking into account the individual conditions of the defendant[5] and the nature of his crime.[6]

Yet, the principle of deferring to the discretion of a trial court clearly does not require abdication of an appellate court's responsibility to superintend the sentencing process. Moreover, respect for a district court's discretion in framing the substance of sentences within statutory limits entails no lack of power to review sentencing procedures. Indeed, "the careful scrutiny of the *judicial process* by which the particular punishment was determined" is "a necessary incident of what has always been appropriate appellate review of criminal cases."[7]

a.

In the course of reviewing the process of sentencing, the Supreme Court in *United States v. Tucker*, 404 U.S. 443 (1972), held that it was proper to remand the case for reconsideration of a sentence when the district judge explicitly took into account the defendant's record of prior convictions, and it later was determined that two of the convictions were constitutionally invalid. The Supreme Court was able to conclude, by reviewing the transcript of

5. As the Supreme Court said in Williams v. New York, 337 U.S. 241, 247 (1949): "[T]he punishment should fit the offender and not merely the crime . . ."

6. For discussion of the need to deter crime generally, as well as to deter and to rehabilitate a particular defendant, *see, e.g.*, United States v. Foss, 501 F.2d 522, 527-528 (1st Cir. 1974); M. Frankel, *Criminal Sentences: Law Without Order* 106 (1972); H. Packer, *The Limits of the Criminal Sanction* 63 (1968). *Cf.* Pell v. Procunier, 417 U.S. 817, 822 (1974): "An important function of the corrections system is the deterrence of crime. The premise is that by confining criminal offenders in a facility where they are isolated from the rest of society, a condition that most people presumably find undesirable, they and others will be deterred from committing additional criminal offenses."

7. Dorszynski v. United States, 418 U.S. 424, 443 (1974), *quoting* United States v. Hartford, 489 F.2d 652, 654 (5th Cir. 1974) (emphasis in original). The Supreme Court in *Dorszynski* held that § 5010(d) of the Federal Youth Corrections Act, 18 U.S.C. § 5005 et seq., requires a federal court to make a finding that the offender would not benefit from treatment under the Act; it does not require that the finding be accompanied by a statement of reasons. This ruling was founded upon the Court's interpretation of Congressional intent. *See* 418 U.S. at 436-440, 442 n.15. The Court did stress that the "no benefit" finding must be clear and explicit, *see id.* at 443-444. *Cf. id.* at 445, 455-457 (Marshall, J., concurring in judgment).

the sentencing proceeding, that constitutionally impermissible convictions had been weighed by the trial court.[8] As the Supreme Court noted:

> The record in the present case makes evident that the sentencing judge gave specific consideration to the respondent's previous convictions before imposing sentence upon him. Yet it is now clear that two of those convictions were wholly unconstitutional under *Gideon v. Wainwright*, 372 U.S. 335.[9]

The Supreme Court further emphasized that Tucker's sentence might have been different had the district judge not taken into account the invalid data.[10]

Thus, *Tucker* stands for the proposition that a district judge, in the exercise of his discretion, must not rely upon incorrect evidence of prior convictions or upon previous convictions illegally obtained.[11] The principle underlying this proposition, stated generally, appears to be that it is unfair for a person to suffer a penalty which, at least to a significant degree, was designed to fit a set of facts that is inapplicable to the individual on whom the sentence is imposed.

b.

In some cases, such as in *Tucker* itself, a reviewing court may be able to conclude, simply on the basis of the record, that a trial judge relied upon specific misinformation about the defendant.[12] It is not difficult to foresee,

8. *See* 404 U.S. at 444 n.1.

9. *Id.* at 447.

10. *See id.* at 448-449.

11. *See* McGee v. United States, 462 F.2d 243, 247 (2d Cir. 1972). *See also* Townsend v. Burke, 334 U.S. 736, 741 (1948) (holding that the defendant was denied due process of law when a trial judge relied upon "assumptions concerning his criminal record which were materially untrue"); United States v. Bass, 535 F.2d 110, 118 (D.C. Cir. 1976) ("In monitoring the sentencing process, appellate courts have shown particular concern over sentences imposed on the basis of information which is materially false.").

12. *See* 404 U.S. at 444 n.1.

however, that the record of a case will not always reveal clearly whether a sentencing tribunal took into consideration erroneous data.[13] Where the record is silent or unclear on the matter, such a gap could be filled by a statement of the reasons for the sentence. At the very least, then, the procedural requirement of a statement of reasons for sentences would assist appellate courts in such circumstances in carrying out the mandate of *Tucker*.

Moreover, the requirement of a statement of reasons would appear to intrude less on the discretion of a trial court than a process of inferring broadly what a judge's reasoning regarding a sentence might have been. When no statement of reasons is set out, an appellate court, in order to vindicate the principle that only correct information may be considered in sentencing, is forced to draw inferences from the record about the district judge's views.[14] However, if a frank statement were made by the trial judge regarding the basis of a sentence, a reviewing court could concentrate on such an explicit enunciation of the factors on which the judge relied. This is not to say that, in all cases in which an appellate court questions the veracity of the information considered in sentencing, confining review solely to the statement of a trial judge would be adequate. Nevertheless, it seems reasonable that in the normal case it would suffice.

Some appellate tribunals have demanded that a district court articulate the basis of its sentence when it is ordered to *resentence* a defendant.[15] *United States v. Lati-*

13. *See, e.g.*, United States v. Latimer, 415 F.2d 1288, 1290 (6th Cir. 1969).

14. *Cf.* United States v. Malcolm, 432 F.2d 809, 818 (2d Cir. 1970) (record apparently revealed that trial judge was confused about prior criminal record of defendant).

15. *See, e.g.*, McGee v. United States, 462 F.2d 243, 246 (2d Cir. 1972). In *McGee*, a defendant was convicted on four counts of violating the Selective Service Act, and identical concurrent sentences were simultaneously imposed. It was subsequently determined that the conviction on the most serious of the counts, namely, refusing to submit to induction, was unlawful. Judge Friendly noted that, in such circumstance, it is not improbable that the initial sentencing process was affected by the conviction that was determined to have been illegal. *Id.* at 246. In light of that, the Second Circuit maintained that the

mer[16] is a good example of a situation in which the most direct response by an appellate court, when it questions whether a sentence depended upon invalid information, is to require the trial court to state its reasons.

In *Latimer*, the defendant was convicted of impeding with a deadly weapon F.B.I. agents from performing their duties. The government, in its brief on appeal, referred to knowledge by the district court of tests performed on a bullet found in a gun held by the defendant at the time of his misconduct, which indicated that the gun had misfired.[17] The appellate court stressed that such information would seem to indicate that the defendant might have pulled the trigger while pointing the gun at the F.B.I. agents, and that this would be a more serious crime than the one for which the defendant was charged and sentenced. The government's brief thus raised "the possibility that the district court may have sentenced Latimer for a more serious offense than the one for which he was convicted . . . ."[18] Since there was no way to be certain that this did not occur, the appellate court vacated the sentence and remanded the case with instructions that the district court file a statement of the reasons for the penalty ultimately imposed.[19]

III.

The justification for requiring a statement of reasons for sentences is not confined to situations where, on appeal, there is a serious question concerning the validity of the

15. (Cont'd.)
trial judge should either reduce the sentences on the remaining counts or provide an explanation for declining to do so. *See also* North Carolina v. Pearce, 395 U.S. 711, 726 (1969): "[W]henever a judge imposes a more severe sentence upon a defendant after a new trial, the reasons for his doing so must affirmatively appear."

16. 415 F.2d 1288 (6th Cir. 1969).

17. *See id.* at 1290.

18. *Id.*

19. *See id.* at 1291.

basis of a sentence.[20] If the need fully to review the accuracy of the information utilized in sentencing were the central support for a statement of reasons, then all that would be indicated, when the grounds of a sentence are in doubt, would be a direction that the trial judge *upon remand* articulate the reasons.

Although the value of such a requirement seems plain, a broader change would also seem to be in order. The rationality and fairness of the sentencing process, and the likelihood that a given sentence will contribute to the promotion of the aims of our system of criminal justice, would be measurably heightened by requiring federal judges generally to give the reasons for the penalties they impose.[21]

a.

There are several policy justifications for the requirement that a trial judge elaborate the factors influencing a particular sentence. First, it would help to assure that the sentence fits the circumstances of a given defendant. For if a judge must elaborate the grounds of a sentencing determination, his attention will necessarily focus on the particular aspects of a case that are apposite to punishment.[22]

20. *Cf.* Kutak & Gottschalk, *In Search of a Rational Sentence: a Return to the Concept of Appellate Review*, 53 *Neb. L. Rev.* 463, 496-499 (1974) (contending that a statement of reasons is desirable largely because it would aid the effective judicial review of sentencing).

21. Under the present practice, federal judges are under no obligation to state the reasons for sentences. *See, e.g.*, United States v. Donner, 528 F.2d 276, 279 (7th Cir. 1976); Washington v. Regan, 510 F.2d 1126, 1129 (3d Cir. 1975). *Cf.* United States v. Velazquez, 482 F.2d 139, 142 (2d Cir. 1973); United States v. Brown, 479 F.2d 1170, 1172 (2d Cir. 1973). The Second Circuit, in *Velasquez* and *Brown*, *supra*, while recognizing the considerable value of a statement of reasons for sentences, did not take the step of requiring that this procedure be followed in all cases. *See also* Dorszynski v. United States, 418 U.S. 424, 455-457 (1974) (Marshall, J., concurring in judgment), where Justice Marshall took the position that a statement of reasons for a judge's "no benefit" finding regarding juveniles not committed to treatment under the Federal Youth Corrections Act, 18 U.S.C. § 5005 *et seq.*, should be required. Thus far, then, the literature on sentencing has gone considerably further in recommending this procedural change than has the case law. *See also* the references cited in note 41 *infra*.

22. *Cf.* Friendly, *Some Kind of Hearing*, 123 *U. Pa. L. Rev.* 1267, 1292 (1975) ("The necessity for justification is a powerful preventive of wrong decisions.").

"A Sphinx-like silence on the court's part precludes anyone (including the parties, the judge and an appellate tribunal) from learning whether he acted in error." *United States v. Brown,* 479 F.2d 1170, 1172 (2d Cir. 1973); *accord, United States v. Velazquez,* 482 F.2d 139, 142 (2d Cir. 1973).

Moreover, such a requisite would help to guarantee that the basis of a sentence is fundamentally rational and objective, and not rooted in nonarticulable considerations.[23] Although any sentencing decision may rest in part on a sense of the case and of the defendant that will be difficult to state with clarity, and although some aspects of the decision may be founded on ineffable factors, it should ultimately be grounded upon concrete and identifiable items revealed in the course of the trial and the sentencing proceeding.[24] Insisting on a statement of reasons ". . . would encourage the judge to clarify and justify, in his own mind, the grounds for the sentence he chooses. As a result, sentencing decisions would tend, on the whole, to be more carefully thought out." *United States v. Velazquez,* 482 F.2d 139, 142 (2d Cir. 1973).

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23. "The procedural requirement of a statement of reasons would be a strong safeguard against rash and arbitrary decisions at this crucial stage of the criminal process where the defendant's liberty is at stake. M. Frankel, Criminal Sentences—Law Without Order 41 (Hill and Wang 1972). It would serve 'to promote thought by the decider, to compel him to cover the relevant points, to help him eschew irrelevancies—and, finally to make him show that these necessities have been served.'" United States v. Brown, 479 F.2d 1170, 1172 (2d Cir. 1973); *see also id.* at 1175-1176 (Feinberg, J., dissenting).

24. Commentators have stressed that the sentencing process is incapable of totally rational definition or description. *See, e.g.,* D. Jackson, *Judges* 370 (1974) ("The psychological roots of a judge's sentence reach into a bog where most judges fear to tread."). Nevertheless, "a good sentence is one which can be reasonably explained," Youngdahl, *Remarks Opening the Sentencing Institute Program,* 35 F.R.D. 387, 388 (1964). By having to state his reasons for a sentence, a trial judge will of necessity focus on the factors relevant to punishment involved in a given case, and this by itself should make the process more rational. *See ABA* Project in Minimum Standards for Criminal Justice, *Standards Relating to Appellate Review of Sentences* (hereinafter cited as *ABA Project*) §2.3(c) and commentary (c) at 45-47 (App. Draft 1968). In addition, sentences that may seem arbitrary or irrationally-based in the absence of an explanation might well have a reasonable foundation. Such a matter can be known with definiteness only when the basis of a sentence is explicitly stated. *See* Coburn, *Disparity in Sentences and Appellate Review of Sentencing,* 25 *Rutgers L. Rev.,* 207, 217 n.63 (1971).

As Judge Wyzanski wrote twenty-five years ago on the question whether a judge should give the reasons for his sentence:

> Eminent and wise judges have warned me against this. Our judgment, they say, is better than our reasons. And it is in vain to attempt to explain the exact proportions attributable to our interest in punishment, retribution, reform, deterrence, even vengeance. But are these arguments valid? For there is grave danger that a sentencing judge will allow his emotion or other transient factors to sway him. The strongest safeguard is for him to act only after formulating a statement of the considerations which he allows himself to take into account.[25]

The requirement of a statement of reasons for a sentence would also reinforce the dignity of the accused, who thereby would be treated as a subject worthy of an explanation for a decision by a representative of the state so poignantly affecting him and his family. Such action by the sentencing judge in many cases could be of therapeutic worth to a defendant. *See Dorszynski v. United States,* 418 U.S. 424, 456 (1974) (Marshall, J., concurring in judgment).[26] Moreover, such an explanation could have great value for correctional authorities when, as is often the case, a sentence results in commitment or continued supervision of a defendant.[27]

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25. Wyzanski, *A Trial Judge's Freedom and Responsibility,* 65 *Harv. L. Rev.,* 1281, 1292-1293 (1952).

26. *See also ABA Project,* note 24 *supra,* at 46-47. Of course, there may be instances in which an explanation would lead to greater harm than benefit to a defendant. In such a case, a trial judge should not make the reasons available to the defendant, although he still should articulate his reasons and incorporate them in the record. The reasons thus would be transmitted to the reviewing court if there is an appeal, and to the corrections authorities if the defendant is committed. This procedure would protect the value of having a statement of reasons, the special sensitivities of a defendant and the discretion of a sentencing judge.

27. *See ABA Project,* note 24 *supra,* at 46. New Jersey recognizes the value of a statement of reasons to correctional officials in requiring that such a statement and the pre-sentence report be submitted to the institution at which a defendant is submitted. *See id., quoting N.J. Super. and County Cts. (Crim.)* R. 3:7-10(b).

In addition, requiring a sentencing tribunal to articulate the basis for its determination and, where appropriate, affording a defendant an opportunity to learn the reasons for the extent of his punishment, would increase the sense of the defendant and the public generally that the criminal process is fair and legitimate. More and more, we are coming to realize that for our system of criminal justice to be respected by the participants in it and by the public, it must be observed to be fair. It is not enough for it to be technically correct, although that, too, is a fundamental aim. Requiring that the basis of a sentence be set forth by a trial judge would promote the principle that "to perform its high function in the best way 'justice must satisfy the appearance of justice' ".[28]

The reality of justice would also be enhanced by such a step. From a defendant's perspective, the requirement of a statement of reasons would reduce the potential for unbridled discretion on the part of a judge in a situation in which the liberty of an accused is directly at stake.[29] From the public's viewpoint, this requirement would aid the citizenry in becoming better informed about the use of judicial power in criminal cases and, in particular, about the nature and grounds of the penalties imposed in the public's name.[30]

28. Offutt v. United States, 348 U.S. 11, 14, *quoted in* In Re Murchison, 349 U.S. 133, 136 (1955). *Cf.* Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 171-172 (1951) (Frankfurter, J., concurring) ("The validity and moral authority of a conclusion largely depend on the mode by which it was reached."). *See also* Summers, *Evaluating and Improving Legal Process—A Plea for 'Process Values,'* 60 *Cornell L. Rev.* 1, 21-27 (1974).

29. *Cf.* K. Davis, *Discretionary Justice* 137 (1969), where it is said that under the present system a sentencing judge "can announce his decision without findings, without reasons, without relating what he does with what he has done before, and without relating his decision to the relevant decisions of other judges. His discretionary power is so much at large that review by an appellate court would usually be futile."

30. *See* Evans & Gilbert, *The Case for Judicial Discretion in Sentencing*, 61 *Judicature* 66, 69 (August 1977): "The public deserves to know the well defined reasons for sentences if their faith in the entire justice system is to be restored." *Cf. Sentencing the Defendant:* He Deserves to Know Why, *The Philadelphia Inquirer*, p. 6-A (August 29, 1977) (referring to the "crime explosion" of the 1960's and the "unrestricted power" of courts in sentencing, which has come under increasing public scrutiny and criticism). *See also*

b.

The major arguments adduced for rejecting the requirement of a statement of reasons for sentences are, at least to me, unconvincing. First, it is difficult to see that such a rule would be an undue burden on trial courts, for, as Justice Marshall has stated, "it is not burdensome to give reasons when reasons exist."[31]

In addition, the tradition of deferring to the discretion of trial courts is not a sufficient basis for failing to effectuate a change in sentencing policy.[32] Indeed, to warrant adherence to present practices, there should be proffered an independent justification for them, especially since it has become increasingly clear that a requirement for a statement of reasons would maximize the achievement of fundamental purposes in our criminal justice system.[33] Further, we have uncovered no data showing that the range of a trial court's discretion would be unduly constrained by

30. (Cont'd.)
McCleary v. State, 49 Wisc. 2d 263, 182 N.W.2d 512, 521 (1971), where the Wisconsin Supreme Court embraced the requirement that reasons for sentences be given by trial judges, and wrote:

"In all Anglo-American jurisprudence a principal obligation of the judge is to explain the reasons for his actions. His decisions will not be understood by the people . . . unless the reasons for decisions can be examined."

31. Board of Regents v. Roth, 408 U.S. 564, 591 (1972) (Marshall, J., dissenting). *See* James v. United States, 476 F.2d 936, 937 (8th Cir. 1973). *Cf.* Davis v. Clark, 404 F.2d 1356, 1358 (D.C. Cir. 1968) (requiring a statement of reasons for denying a motion for leave to appeal in forma pauperis "is not onerous if the matter was dealt with in a conscientious manner in passing on the merits"). *See generally* Davis, *Discretionary Justice* 104-105 (1969); Note, *Appellate Review of Sentences and the Need for a Reviewable Record*, 1973 *Duke L.J.* 1357, 1375.

32. An argument that is often advanced for not imposing the requirement in question is that it is at odds with our tradition of deferring to the sentencing discretion of trial judges. *See, e.g.*, United States v. Brown, 379 F.2d 1170, 1173 (2d Cir. 1973), where the court wrote that, although a trial judge should be "encouraged" to state the reasons for sentences, "we have repeatedly held that in view of the trial judge's very broad discretion . . . he is generally under no obligation to give reasons for his sentencing decisions . . ."

33. *Cf.* Holmes, *The Path of the Law*, 10 *Harv. L. Rev.* 457, 469 (1898): "It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past."

asking a judge to elaborate the reasons for his sentencing determinations.

Another argument sometimes advanced for not imposing such a procedural requirement is that sentences cannot be "explained" in an orderly manner because the decisional processes leading to them are not structured.[34] The major difficulty with this position, putting aside the point that it apparently rests on an unsupported psychological premise, is that it proves too much. Surely many complex decisions in the judicial process have at their base some nonarticulable factors. But this point alone is not a sufficient justification to forego the attempt to make and to support major choices in a careful, rational manner.

c.

To fail to insist that trial judges present the reasons for sentences is in effect to ignore the existence of unevenness in present practices. Since courts have displayed great sensitivity to the procedural rights of defendants during other stages of the criminal process, the act of sentencing itself is in the rather unique position of relative freedom from procedural scrutiny.[35] This is especially disconcerting because, in our criminal justice system, guilty pleas have become the norm.[36] Since more than 80% of

34. *See* United States v. Schipani, 315 F. Supp. 253, 259 (E.D. N.Y.), *aff'd*, 435 F.2d 26 (2d Cir. 1970), *cert. denied*, 401 U.S. 983 (1971): "Frequently, the decision will rest on the application of unarticulated principles and factors lying at the threshold of the conscious." *See also* Note, *Appellate Review of Sentences and the Need for a Reviewable Record*, 1973 *Duke L.J.*, 1357, 1375.

35. "[B]y comparison to the care with which the less-frequent problem of guilt is resolved, the protections in most jurisdictions surrounding the determination of sentences are indeed miniscule." *ABA Project*, note 24 *supra*, Introduction at 1-2. *See also* Berkowitz, *The Constitutional Requirement for a Written Statement of Reasons and Facts in Support of the Sentencing Decision: a Due Process Proposal*, 60 *Iowa L. Rev.* 205, 205-206 (1974).

36. *See* L. Weinreb, *Denial of Justice—Criminal Process in the United States* 71 (1977): "The scheduling of a trial is generally nothing more than an elaborate charade . . . When all postponements of the trial are over and the scheduled date is imminent, in eight or nine cases out of ten the defendant pleads guilty and the case is taken off the court's calendar."

all criminal cases involve no judicial determination of guilt,[37] from a practical perspective sentencing decisions may well be the most important ones made by trial judges in criminal cases. In such a system, it is particularly incongruous to fail to accord to a defendant at sentencing the kind of procedural protections provided at other stages of the criminal process.[38]

A further anomaly exists in this Circuit, where Pennsylvania and New Jersey require trial judges to give reasons for sentences while the federal courts do not.[39] Although this alone is, of course, an insufficient ground for imposing the requirement on district courts, it should not be overlooked. Particularly when the policy arguments tend to point in one direction, it is important to consider the value of having a procedural system in which the fed-

37. During fiscal year 1977, 84.25% of all criminal defendants in the Third Circuit pled guilty or their cases were dismissed. (Information supplied by the Administrative Office of United States Courts). *See Administrative Office Reports for Fiscal Year 1976*, Tables D-6.

38. For example, under the guidelines of the Federal Parole Commission, an official notification of the denial of parole is to be accompanied by the reasons for that decision. *See* 28 CFR §2.13; Genego, et al., *Parole Release Decisionmaking and the Sentencing Process*, 84 *Yale L.J.* 810, 829 n.93 (1975). Also, the Supreme Court has held that, when parole is revoked, the minimum procedures mandated by due process include, *inter alia*, "a written statement by the factfinders as to the evidence relied on and reasons for revoking parole." Morrissey v. Brewer, 408 U.S. 471, 489 (1972). *See also* Wolff v. McDonnell, 418 U.S. 539, 564-565 (1974) (holding that due process requires, in the context of prison disciplinary proceedings resulting in the loss of good time credits, that a factfinder make a statement of reasons for the decision, and of the evidence relied upon; such a requirement will help to assure that the officials "will act fairly.").

39. The Supreme Court of Pennsylvania recently announced that henceforth trial courts are to articulate the reasons for sentence. *See* Commonwealth v. Riggins, 377 A.2d 140, 144-150 (Pa. 1977). The Supreme Court of New Jersey also has a rule requiring a statement of reasons when a custodial sentence is imposed. *See* Washington v. Regan, 510 F.2d 1126, 1129 n.4 (3d Cir. 1975). The New Jersey *Sentencing Manual for Judges* (1975) notes:

> Formulation of reasons should lead to a greater uniformity of sentencing by trial judges and should convey to appellate courts, institutions, and the State Parole Board information of the greatest value. . . Given the difficult problems of theory and fact involved in a review for abuse of discretion in sentencing, the reasons for the sentence are essential to the appellate record . . .

New Jersey v. Sanducci, No. 77-1491 (App. Div. Sup. Ct., June 23, 1977).

eral courts do not diverge increasingly and substantially from state courts in the safeguards afforded defendants.[40]

To persist in declining to require that district judges provide reasons for sentences is also to overlook a growing body of legal literature—representative of judges, lawyers, scholars, and other commentators on the criminal process—affirming the merit of such a procedure.[41] For instance, as the American Bar Association Project on Minimum Standards for Criminal Justice recommended nearly a decade ago:

> The sentencing judge should be required in every case to state his reasons for selecting the particular sentence imposed. Normally, this should be done for the record in the presence of the defendant at the time of sentence. In cases in which the sentencing judge deems it in the interest of the defendant not to state fully the reasons for the sentence in the presence of the defendant, he should prepare such a statement for transmission to the reviewing court as a part of the record.[42]

40. *Cf.* Brennan, *State Constitutions and the Protection of Individual Rights*, 90 *Harv. L. Rev.* 489, 495-498, 502-503 (1977), where concern is expressed because state courts currently seem to be more active than federal courts in protecting the individual rights of citizens.

41. For discussion of the benefits of a statement of reasons for sentences, *see, e.g.*, Dorszynski v. United States, 418 U.S. 424, 455-457 (1974) (Marshall, J., concurring in judgment); United States v. Moore, 540 F.2d 1088, 1091-1092 (D.C. Cir. 1976) (separate statement of Bazelon, C.J.); United States v. Velazquez, 482 F.2d 139, 142 (2d Cir. 1973); United States v. Brown, 479 F.2d 1170, 1172-1173 (2d Cir. 1973); United States v. Phillips, 479 F.2d 1200, 1202 (D.C. Cir. 1973); K. Davis, *Discretionary Justice* 137 (1969); Frankel, *Criminal Sentences—Law Without Order* 39-49 (1972); Goldfarb and Singer, *After Conviction* 191-195 (1972); American Bar Association Project on Minimum Standards for Criminal Justice, *Standards Relating to Appellate Review of Sentences* §2.3(c) and commentary (e) at 45-47 (App. Draft 1968); American Bar Association Project on Minimum Standards for Criminal Justice, *Standards Relating to Sentencing Alternatives and Procedures*, §5.6(ii) and commentary (b) at 270-271 (App. Draft 1968); Berkowitz, *The Constitutional Requirement for a Written Statement of Reasons and Facts in Support of the Sentencing Decision: A Due Process Proposal*, 60 *Iowa L. Rev.* 205, 208-212 (1974); Wyzanski, *A Trial Judge's Freedom and Responsibility*, 65 *Harv. L. Rev.* 1281, 1292-1293 (1952); Youngdahl, *Remarks Opening the Sentencing Institute Program*, 35 F.R.D. 387, 388 (1964); Note, *Appellate Review of Sentences and the Need for a Reviewable Record*, 1973 *Duke L.J.* 1357; Symposium, *Appellate Review of Sentencing*, 32 F.R.D. 257, 263, 274-275 (1962).

42. *ABA Project*, note 24 *supra* §2.3(c).

IV.

In view of these considerations, the time is now ripe to require, on the basis of our supervisory power over district courts in this Circuit,[43] that trial judges set forth the reasons for the sentences they impose.[44] Such a rule would help to assure that sentences are grounded on the facts of a particular case, and would serve the broader aims of promoting the defendant's rehabilitation as well as the fairness and rationality of sentencing procedures. It would also eliminate the undue delay that frequently results when the sentencing process is questioned in an appellate court, and the trial judge has not given his reasons for the sentence.[45] These gains would obtain without overly burden-

43. A constitutional question of due process may also be involved in the failure of judges to give reasons for sentences. That issue is not considered in this opinion, although, if the requirement of a statement of reasons is not adopted, it may well have to be addressed in future cases. *See generally* Berkowitz, *The Constitutional Requirement for a Written Statement of Reasons and Facts in Support of the Sentencing Decision: A Due Process Proposal*, 60 *Iowa L. Rev.* 205 (1974).

44. It seems important to underscore what is *not* being recommended in this concurring opinion. First, the particular procedural requirement supported herein should not be confused with a broader recommendation made in some quarters for appellate review of the substance of sentences. *See, e.g.*, Kennedy, Criminal Sentencing: *A Game of Chance*, 60 *Judicature* 208, 212-213 (December 1976); Comment, *Appellate Review of Sentences: a Survey*, 17 *St. Louis L.J.* 221, 244 (1972). Since appellate review of the substance of sentences would go much farther than a procedural requirement that reasons for sentences be advanced, the former matter must be analyzed separately. That task is not intended to be undertaken, nor its result in any way presupposed, in this opinion.

In addition, a distinction should be drawn between the suggestion that a statement of reasons be required, on the one hand, and the demand that a statement of a certain type or duration be mandated, on the other hand. It is urged here only that *some* statement of reasons for sentences be provided by trial judges. The additional question of what sort of explanation is required in certain circumstances is a matter worthy of separate consideration in an appropriate case.

45. Such delay occurs when the appellate court is forced to remand a case for reconsideration of the sentence because no clear basis of the sentence has been enunciated. *Cf.* United States v. Eberhardt, 417 F.2d 1009, 1014-1015 (4th Cir. 1969), where Judge Sobeloff wrote of a trial judge's sentencing power:

> "[I]t is true that he could sentence only for the offense of which the defendants had been convicted. . . *Precisely what passed through the judge's mind is purely speculative* and we have no reason to think that the judge undertook to impose a penalty for the second offense. However, we consider it fair and in the interest of justice in this instance to remand the case . . . for further consideration of the sentences. . ." (emphasis added)

See also Jenkins v. United States, 530 F.2d 1203, 1204 (5th Cir. 1976).

ing trial judges, and without invading the realm of their discretion to set sentences on the basis of their knowledge of the defendant and the circumstances surrounding the crime.

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APPENDIX B
JUDGMENT

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 76-2584, 76-2585, 76-2586, 76-2587,
76-2588 and 76-2628

UNITED STATES OF AMERICA

v.

JOHN BAZZANO, JR. a/k/a "JOHNNY", a/k/a "J"
JOSEPH DE MARCO a/k/a "JOE"
JOSEPH CHARLES YIMIN a/k/a "BULL"
CHARLES PATRICKKELLINGTON
a/k/a "CHUCK"
FRANCIS DATTALO a/k/a "FRANK" a/k/a "HOG"
ATTILIO POLICASTRO a/k/a "FLAT TOP"
PRIMO VICTORY MOLLICO a/k/a "XG"
JOHN FRANKLIN MATZ a/k/a "JACK"
a/k/a "MAYOR"
DAVID RANKIN GUFFEY a/k/a "CHIEF"
a/k/a "CLAIRTON CHIEF"
JOHN REGIS WARD a/k/a "JP" a/k/a "WARD"
PETER PAUL ORSINI a/k/a "PETE"
a/k/a "PETE ORSI"
DOMINIC PAUL SERAPIGLIA
a/k/a WILSON CONSTABLE
THOMAS C. POLJAK a/k/a "ELIZ CHIEF"
GEORGE B. HINES a/k/a "ELIZ CONSTABLE"

John Bazzano, *Appellant in No. 76-2584*

David Rankin Guffey, *Appellant in No. 76-2585*

John Regis Ward, *Appellant in No. 76-2586*

Peter Paul Orsini, *Appellant in No. 76-2587*

Thomas C. Poljak, *Appellant in No. 76-2588*

John Franklin Matz, *Appellant in No. 76-2628*

(D.C. Crim. No. 75-192)

Appendix B - Judgment Order

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Present: ADAMS, VAN DUSEN and HUNTER, Circuit Judges

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Western District of Pennsylvania and was argued by counsel on September 6, 1977.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgments of the said District Court filed November 16, 1976, be, and the same are hereby affirmed.

ATTEST:
/s/ Thomas F. Quinn
Clerk

December 21, 1977
Certified as a true copy and issued in lieu of a forman mandate as to No. 76-2584 on February 1, 1978.

Test: THOMAS F. QUINN
Clerk, United States Court of Appeals
for the Third Circuit

APPENDIX C

Sur Petition for Rehearing

UNITED STATES COURT OF APPEALS
For the Third Circuit

No. 76-2584

UNITED STATES OF AMERICA

vs.

JOHN BAZZANO, JR. a/k/a "JOHNNY" a/k/a "J"

Appellant

SUR PETITION FOR REHEARING EN BANC

Present: SEITZ, VAN DUSEN, ALDISERT, ADAMS, GIBBONS, ROSENN, HUNTER, GARTH and HIGGINBOTHAM, Circuit Judges

The petition for rehearing filed by Appellant in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of

Appendix C - Sur Petition for Rehearing

the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

Arlin M. Adams

Circuit Judge

Dated: January 24, 1978

APPENDIX D

Memorandum and Order

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	
vs.	:	
JOHN BAZZANO, JR.	:	
JOHN FRANKLIN MATZ	:	
DAVID RANKIN GUFFEY	:	Criminal No. 75-192
JOHN REGIS WARD	:	
PETER PAUL ORSINI	:	
DOMINIC PAUL SERAPIGLIA	:	
THOMAS C. POLJAK	:	
GEORGE B. HINES	:	

MEMORANDUM

On March 31, 1976, a jury returned verdicts of guilty on all applicable counts as to John Bazzano, Jr., John Franklin Matz, David Rankin Guffey, John Regis Ward, Peter Paul Orsini, and Thomas C. Poljak. In Count 3 of the indictment, all of the defendants were charged with conducting, supervising, directing, or owning all or part of an illegal

gambling business, in violation of 18 U.S.C.A. §1955.[1] In each of Counts 4, 5, 6, 7, 8, 10 and

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1

18 U.S.C.A. §1955 provides in pertinent part:

Prohibition of illegal gambling businesses

(a) Whoever conducts, finances, manages, supervises, directs, or owns all or part of an illegal gambling business shall be fined not more than $20,000.00 or imprisoned not more than five years, or both.

(b) As used in this section --

(1) "illegal gambling business" means a gambling business which --

(i) is a violation of the law of a State or political subdivision in which it is conducted;

(ii) involves five or more persons who conduct, finance, manage, supervise, direct or own all or part of such business; and

(iii) has been or remains in substantially continuous operation for a period in excess of thirty days or has a gross revenue of $2,000 in any single day.

11, John Bazzano, Jr., and others[2] were charged with conspiring with one of the remaining defendants, all of whom were public officials,[3] to obstruct the enforcement of the criminal laws of Pennsylvania with the intent to facilitate an illegal gambling business, while Count 9 charged John

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2

Joseph DeMarco, Joseph Charles Yimin, Charles Patrick Kellington, Francis Datallo, Attilio Policastro, and Primo Victor Mollica, who were charged along with John Bazzano, Jr., entered guilty pleas during the course of the trial to two counts of the indictment.

3

18 U.S.C.A. §1511 provides in pertinent part:

Obstruction of State or local law enforcement

(a) It shall be unlawful for two or more persons to conspire to obstruct the enforcement of the criminal laws of a State or political subdivision thereof, with the intent to facilitate an illegal gambling business if --

(1) one or more of such persons does any act to effect the object of such a conspiracy;

(2) one or more of such persons is an official or employee, elected, appointed, or otherwise, of such State or political subdivision; and

(3) one or more of such persons conducts, finances, manages, supervises,

Bazzano, Jr., and an unindicted co-conspirator, John C. Hammer, with the same conduct, all in violation of 18 U.S.C.A. §1511. Counts 1 and 2 of the indictment had previously been dismissed by the court.

Dominic Paul Serapiglia and George B. Hines, public official defendants, were found not guilty on all applicable counts.

John Bazzano, Jr., John Franklin Matz, David Rankin Guffy, John Regis Ward, Peter Paul

3 (continued)

directs, or owns all or part of an illegal gambling business.

(b) As used in this section --

(1) "illegal gambling business" means a gambling business which --

(i) is a violation of the law of a State or political subidivision in which it is conducted;

(ii) involves five or more persons who conduct, finance, manage, supervise, direct, or own all or part of such business; and

(iii) has been or remains in substantially continuous operation for a period in excess or thirty days or has a gross revenue of $2,000 in any single day.

Orsini, and Thomas C. Poljak have moved for Judgments of Acquittal, Arrest of Judgment, and for New Trial. Although the defendants raise over twenty points of error, their briefs address three main issues applicable to all defendants,[4] that of the sufficiency of the evidence, violations of the hearsay rule, and violation of the court's sequestration order, three additional issues being raised by individual defendants -- failure of the government to provide evidence exculpating defendant Bazzano, ineffective assistance of counsel on behalf of defendant Matz, and insufficiency of the indictment as to defendant Poljak.

I. SUFFICIENCY OF THE EVIDENCE

Government witness Betty Stanizzo testified that her husband, Pat Stanizzo, agreed to operate a numbers business in Clairton, Pennsylvania, for defendant John Bazzano in exchange for a weekly salary of $200 and 30% of the win, Bazzano receiving 60% of the win and $200 per week (Vol. 9, pp. 171-75), and that, pursuant to this agreement, Bazzano made weekly trips to the Stanizzo home to check master tapes which were prepared

4

For purposes of all proceedings, the motion of one defendant was deemed to be the motion of all.

by one Andrew J. Moody and to count and divide the money which had been delivered by Gary Pastore (Vol. 9, pp. 171-77)

Moody, who kept the records of the business in exchange for a salary of $125 weekly and.10% of the business (Vol. 9, p. 30, 100), testified that he met with John Bazzano four or five times when Pat Stanizzo was ill, Bassano giving directions to Moody "on Stanizzo's behalf" (Vol. 9, p. 87). On one occasion, Bazzano was present at the Court Lounge in Pittsburgh, Pennsylvania, when a discussion took place concerning Pat Stanizzo's continued participation in the business (Vol. 9, pp. 90-91) and, on another occasion, he met with Moody and Charles Kellington at the Holiday Inn in West Mifflin, Pennsylvania, again concerning the Clairton business, at which time Bazzano stated that "the business is supposed to go where it was supposed to go" (Vol. 9, p. 92).

Joseph Francesconi, a retired numbers writer, testified that, when he needed money on one occasion to pay $1800 for a "three dollar hit", John Bazzano delivered it to him (Vol. 8, p. 6).

The adding machine tapes, which constituted the records of the operation, contained notations made by Moody at Stanizzo's direction indicating

payments of amounts varying from $25 to $2, 300, including a number of entries in the amount of $200, opposite the letter "J".

Several of the adding machine tapes reflected expenses of $1, 500, paid at various times to "Mayor". Betty Stanizzo testified that, as a result of a meeting at the West Mifflin Holiday Inn with "John", Gary Pastore, Pat Stanizzo, and John Matz, the Mayor of Clairton, "they knew they had the [Clairton numbers] business" (Vol. 9, p. 179). Some months later, Pat Stanizzo directed Mrs. Stanizzo to count $1, 500, place it in an envelope, and drive him to John Matz's place of business. Pat Stanizzo entered with the envelope, and the Stanizzos returned home (Vol. 9, pp. 180-81).

The adding machine tapes also showed expenses at various times to "Pete", "Pete Orsini", "Orsini", and "Pete Orsi" in the amount of $200. Moody testified that on one occasion Stanizzo gave him an envelope, directing him to deliver it to Pete Orsini, Constable of the City of Clairton. Moody delivered the envelope without comment and it was accepted by Orsini (Vol. 9, p. 116).

"Chief Clairton" was the notation beside several items in the amount of $150. 00. Thomas

Milas, a police officer in the City of Clairton, testified that from January 1, 1970, to December 31, 1973, the official records reflected no arrests in the City of Clairton for state lottery or bookmaking violations (Vol. 7, pp. 709-10). Defendant David Guffey was the Clairton Chief of Police during that period of time.

A number of $100 items were designated "Elizabeth Chief" and "Chief Eliz." Philip Sevcik, a former numbers writer in the City of Elizabeth, testified that, at the direction of Gary Pastore, he delivered an envelope to Thomas C. Poljak, Chief of Police of the City of Elizabeth, informing Poljak, "Gary says to give this to you." Poljak's response was "O.k." (Vol. 7, p. 739). Victor Spernak, also a former numbers writer in Elizabeth, testified that Gary Pastore asked him to take money to Poljak "for protection" when Pastore was unable to do so. On each occasion, he paid Poljak $100, meeting him in the street or behind Poljak's house. (Vol. 7, pp. 749-51).

The evidence, considered in the light most favorable to the government, is sufficient to establish that John Bazzano owned, operated, directed, or supervised an illegal gambling business, that the public officials aided or abetted this endeavor,

and that John Bazzano, and others, and the named public officials conspired to obstruct the enforcement of the criminal laws of Pennsylvania.

II. HEARSAY

Rule 803(6) of the Federal Rules of Evidence provides:

> (6) Records of regularly conducted activity. A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity and if it was the regular practice of that business activity to make the memorandum, report, record or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

The court finds no merit to the defendants' contention that the adding machine tapes did not

constitute a record of a business or "calling of any kind" because the source of information or method or circumstances of preparation indicate lack of trustworthiness of the entries made on the tapes.

Andrew Moody testified that he collected the daily numbers slips and bets, made a daily tape of the totals and, at the end of each week, transcribed the daily tapes onto a master tape consisting of an original and carbon copy (Vol. 9, p. 76). In short, Moody "ran everything from top to bottom" (Vol. 9, p. 70). Expenses that he himself did not pay were entered at Pat Stanizzo's direction. That Moody had no personal knowledge of the alleged payoffs noted on the tapes does not affect the admissibility of the records, although the source of the entries may relate to the weight of the evidence.

The trustworthiness of the entries was put into issue by an attack on the credibility of Gary Pastore, deceased at the time of trial, who had admitted to Special Agent Fitzpatrick that he was involved in the collection of money and payment of

expenses (Vol. 10, p. 43),[5] which Stanizzo then directed Moody to enter on the records. On cross examination, the defense probed the inconsistency

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5 Special Agent Fitzpatrick was permitted to testify as to statements made to him by Pastore during interviews. Rule 804 of the Federal Rules of Evidence provides:

> (b) Hearsay exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness.
>
> (3) Statement against interest. A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject him to civil or criminal liability, or to render invalid a claim by him against another, that a reasonable man in his position would not have made the statement unless he believed it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissable unless corroborating circumstances clearly indicate the trustworthiness of the statement.
>
> (a) Definition of unavailability. "Unavailability as a witness" includes situations in which the declarant --

between record entries indicating that John Hammer received $150 per month, which was corroborated by John Hammer's testimony, and a statement made by Pastore that Hammer received $100 a month from two operations. On redirect, the government attempted to rehabilitate Pastore by other statements consistent with the tape entries.

Rule 806 of the Federal Rules of Evidence provides:

> Attacking and Supporting Credibility of Declarant
>
> When a hearsay statement, or a statement defined in Rule 801 (d)(2), (C), (D) or (E), has been admitted in evidence, the credibility of the declarant may be attacked, and if attacked may be supported, by any evidence which would be admissible for those purposes if declarant had testified as a witness. . .

It is concluded that the consistent statements were properly admitted into evidence.

---

5 (continued)

> (4) is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity.

III. SEQUESTRATION ORDER

The defendants contend that, during a one-day recess occasioned by the illness of the government attorney, the sequestration order of the court[6] was violated when Agent Fitzpatrick reviewed the grand jury testimony of Betty Stanizzo and Andrew Moody in the presence of each other, and that his actions constituted prosecutorial misconduct.

The matter having been brought to the attention of the court in the absence of the jury, defense counsel moved to prohibit the testimony of both witnesses, the motion being denied orally by the court (Vol. 9, pp. 63-64). Thereafter, both witnesses were permitted to testify and were subject to extensive cross-examination as to the manner in which their grand jury testimony was reviewed. Their testimony varied in a number of respects, and all the circumstances militate against any

---

6 Rule 615. Exclusion of Witnesses

> At the request of a party the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order of its own motion. . .

inference that the testimony of Moody and Mrs. Stanizzo was "shaped" in contravention of the purpose of the sequestration rule. Taylor v. United States, 388 F.2d 786, 788 (9th Cir. 1968). In addition, disclosure to the jury of the surrounding circumstances is of itself a sufficient method of enforcement of the rule. See Holder v. United States, 150 U.S. 91, 92 (1893). It is concluded that no prejudice to the defendant resulted which would warrant the granting of a new trial.

IV. BRADY MATERIAL

Defendant Bazzano contends that the government failed to provide exculpatory material as required by Brady v. Maryland, 373 U.S. 83 (1963), and requests a hearing on this issue.

During pre-trial motions, the government acknowledged its duty under Brady to disclose any exculpatory material (Transcript, pp. 67-77), and has consistently maintained that it has no such evidence. Since the defendant has failed to set forth any material not known to him at the time of trial, his Brady assertion does not support the motion for new trial and his request for a hearing will be denied.

V. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant Matz contends that the court's failure to sever or grant a continuance on motion of newly-substituted counsel denied him effective assistance of counsel.

On Monday, March 8, 1976, the date set for the commencement of trial, the court was informed that Mr. Sullivan, appointed as counsel on July 2, 1975, was hospitalized and uncertain as to when he could resume Matz's defense. Joseph Bonistalli was substituted as counsel, and the selection of the jury was postponed until Tuesday, March 9, 1976. Not until March 23, 1976, when the adding machine tapes containing the expenses of the gambling business were introduced through the testimony of Andrew Moody, and when Mrs. Stanizzo testified concerning her knowledge of the disposition of the envelope containing $1,500, was there any testimony linking Matz to the gambling business. Throughout the trial, Mr. Bonistalli vigorously cross-examined government witnesses and otherwise actively participated in the proceedings.

Considering all the circumstances, the court concludes that Mr. Bonistalli's representation of

defendant Matz met the standard of "normal competency" set forth in Moore v. United States, 432 F.2d 730 (1970), and the court's denial of a severance or a continuance therefore presents no basis for the granting of a new trial.

VI. INSUFFICIENCY OF THE INDICTMENT

Defendant Poljak contends that omission of the following language contained in other similar counts of the indictment rendered Count 10 defective:

> "[the defendants] agreed to pay varying sums to the defendant [Thomas C. Poljak] . . . , and that the defendant [Thomas C. Poljak] agreed to forego the enforcement of the penal laws of the Commonwealth of Pennsylvania relating to illegal gambling businesses against participants John Bazzano, Jr. . . . . , Joseph DeMarco. . ., Joseph Charles Yimin . . ., Charles Patrick Kellington . . ., Francis Dattalo. . ., Attilio Policastro . . ., and Primo Victor Mollica . . .

Paragraph 1 of Count 10 clearly sets forth the crime with which Poljak was charged; paragraph 6 charges

that the defendant conspired to facilitate the protection of the illegal gambling business "in consideration of receiving these sums" and, under the heading of Overt Acts, Count 10 further charges that Poljak received $100 monthly from Gary Pastore or Victor Spernak from January, 1970, to January, 1975.

It is concluded that the omission in paragraph 5 did not render Count 10 of the indictment fatally defective and that the defendant was sufficiently apprised of the charges against him.

VII. ADDITIONAL CONTENTIONS

After careful consideration, the court concludes that the following contentions by the defendants are without merit:

1. The court erred in refusing to grant the defendants additional preemptory challenges.

2. The court erred in denying motions for severance and relief from prejudicial joinder.

3. The court erred in refusing to dismiss the indictment for prosecutorial misconduct.

4. The court erred in failing to instruct the jury that certain witnesses were not equally available to the defendants because the defendants could not grant immunity to witnesses.

5. That the verdicts acquitting two of the defendants are inconsistent with the guilty verdicts rendered against John Bazzano.

6. That 18 U.S.C.A. §§1955 and 1511 are inconsistent and that the government should be put to an election between them.

The court further finds no basis in law or fact to order a hearing, demanded by defendant Bazzano, into alleged grand jury abuses.

An appropriate order will be entered.

/s/ Herbert P. Sorg C. D. J.

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	
vs.	:	
JOHN BAZZANO, JR.	:	
JOHN FRANKLIN MATZ	:	
DAVID RANKIN GUFFEY	:	Criminal
JOHN REGIS WARD	:	
PETER PAUL ORSINI	:	No. 75-192
DOMINIC PAUL SERAPIGLIA	:	
THOMAS C. POLJAK	:	
GEORGE B. HINES	:	

ORDER

AND NOW, this 9th day of November, 1976, after hearing and upon due consideration of the Defendants' Motions for Judgment of Acquittal, Arrest of Judgment, and for New Trial.

IT IS ORDERED that the said Motions be and the same are hereby denied.

IT IS FURTHER ORDERED that the defendants appear for sentencing on Monday, November 15, 176, at 4:00 P.M.

/s/ Herbert P. Sorg C. D. J.

cc Counsel of Record

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA, Plaintiff	:	
- versus -	:	
JOHN BAZZANO, JR., JOSEPH DeMARCO, JOSEPH CHARLES YIMIN, CHARLES PATRICK KELLINGTON, FRANCIS DATTALO, ATTILIO POLICASTRO, PRIMO VICTOR MOLLICA, JOHN FRANKLIN MATZ, DAVID RANKIN GUFFEY, JOHN REGIS WARD, PETER PAUL ORSINI, DOMINIC PAUL SERAPIGLIA, THOMAS C. POLJAK and GEORGE B. HINES	:	Criminal Action No. 75-192

ORAL ARGUMENT ON MOTIONS TO SUPPRESS EVIDENCE, ETC.

UNITED STATES COURTHOUSE
Pittsburgh, Pennsylvania
December 16, 1975

BEFORE: HERBERT P. SORG
Chief Judge
United States District Court

Official Reporter:

Theodore W. Thomas

MR. GONDELMAN: If the Court please, I join in that motion. We filed a motion for the very matters Mr. Doherty is talking about. I go further than Mr. Doherty, though.

Your Honor talks about the obligation of the Government to say if they have a witness who says that they know John Bazzano and that he is in the numbers business, then we know it is incriminating evidence, and we wait until we get Jencks Act material to see if there is impeaching evidence.

However, if that same person has given statements for years or months which say, "I don't know John Bazzano; I never met John Bazzano; I don't know what business he is in, and I am not in the numbers business; and John Bazzano isn't," and then, later, because the Government has the opportunity to waive the immunity flag at them, they get that witness to suddenly see the truth and light, as Judge Friendly once said --

THE COURT: That would be a situation, Mr. Gondelman, where the evidence would be absolutely tainted.

MR. GONDELMAN: But it would be exculpatory.

THE COURT: That should be disclosed. There is no question in my mind about that.

MR. GONDELMAN: But, sometimes, I am told by the Government that that is for cross-examination in Jencks, not Brady.

THE COURT: Well, I am ruling now, that evidence such as that, if not presented, would taint the evidence which is presented.

MR. GONDELMAN: Fine.

MR. ROARK: I would agree.

THE COURT: And the Government is in agreement with that phase of it.

MR. GONDELMAN: Now, if someone who implicated, without naming them, five or six people in this operation is asked by the Government if they know John Bazzano and they are going to testify they know all about this big numbers operation that the Government thinks exists and they are going to try to prove John Bazzano is the leader of, I think, from what I read in the newspapers, anyway, anybody who implicates six or seven, eight or nine, but he says, "Bazzano, I never heard of him, I think he went out of business fifteen years ago," that is exculpatory, because the Government may not call that witness, and that witness may well not be in town, where

I might have subpoenaed him to be in town, and if he doesn't know John Bazzano but he knows all about this numbers operation, that is exculpatory evidence. It is not negative. It is exculpatory.

THE COURT: If the Government would make a decision that it is not exculpatory, it is not some such thing as should be revealed, it is negative testimony and then a judgment has to be made on that at some stage in the proceedings, I will not impose the obligation on the Government to make a judgment as to what is favorable to the defendant or not. What is clearly exculpatory or what is the subject matter of a positive incident that would discredit the testimony which would be presented by a Government witness is exculpatory, there is no question in my mind, but to impose the obligation on the Government to screen the proceedings and make suggestions to the defendants in areas where there might be an individual who would have negative testimony or a lack of knowledge, to impose the obligation on the Government to make that kind of a judgment at the risk of jeopardizing a conviction, this Court will not do it.

MR. GONDELMAN: That would make a very difficult burden on the Government, Your Honor. I am not asking you to do that. All I am

asking Your Honor to do is say to the Government, "Any time you have a statement from someone who knows about this numbers operation but does not know John Bazzano, that is exculpatory, not negative, but exculpatory," and I am entitled to it.

THE COURT: In what respect? For example, if the witness knows four people who are involved in activities and does not know five--

MR. GONDELMAN: And who, himself, has been given immunity, and who is supposed to be tying -- it is a conspiracy case, and everybody is supposed to be sleeping and tied together, you see, and, yet, the one who testifies for the Government and tries to tie it all together leaves one or two -- "I don't know Bazzano," or it may be Yimin or anybody.

THE COURT: If this witness attempted to tie Bazzano into it and made a statement he didn't know Bazzano, I would have no question, and the Government is directed to reveal any such instance, but, if a witness will testify as to the activities of four people and give no testimony to the activities of the other people, the fact that he may not know any of the other people, I would not require the Government to disclose that now,

if the witness doesn't suggest that there is involvement on the part of those other people. If, as you say, it would be the thrust of his testimony to implicate nine people, when, as a matter of fact, he only knows four people, then the fact that he doesn't know five of them should be disclosed, but, if it is the thrust of his testimony, on implicating four people and not any of the others of the nine, the fact that he doesn't know any of the other nine doesn't appear to me to be exculpatory with respect to his testimony.

MR. GONDELMAN: Yes, Your Honor. I don't know all what the Government has, but I can envision, in this case, that there will be the reverse side of incriminating testimony of alleged co-conspirators. If the Government doesn't indict somebody but says he is a co-conspirator and they say, "He told me," then they will later tie him up as a co-conspirator, it is admissible, by the same token, to know if that same alleged co-conspirator says this defendant -- whether it be Bazzano or Yimin -- is not a part of the operation. That is exculpatory, and that, I must have.

THE COURT: If the Government intends to produce one witness to testify to the statement

of a co-conspirator and has evidence, says that the co-conspirator made an inconsistent statement to anybody else, this would certainly be exculpatory and should be revealed.

MR. ROARK: The Government would go with Brady. I know what I am obligated to do.

THE COURT: You will classify that under Brady, any such instances? That is required by the rules. To permit a witness to testify to the statement of a co-conspirator, which is the subject matter or would be made the subject matter of a charge of inconsistency with other statements and not present both of them, in my opinion, would be presenting tainted evidence.

APPENDIX F

BAIL REFORM ACT FORM NO. 2

UNITED STATES DISTRICT COURT

WESTERN District of PENNSYLVANIA

ted States of America

v.

JOHN BAZZANO, JR.
Defendant

CRIMINAL NO. 75-85
Magistrate's Docket No. 75
Case No. 111-RM

ORDER SPECIFYING METHODS AND CONDITIONS OF RELEASE

Part I—Preferred Methods of Release

It is hereby ORDERED that the above-named defendant be released, provided

Check one

sonal ognizance ( ) that he promises to appear at all scheduled hearings as required.

ecured Bond ( ) that he will execute a bond binding himself to pay the United States the sum of ____ dollars ($) in the event that he fails to appear as required.

(NOTE: The judicial officer is required to release the defendant by one of the above methods unless he determines that such a release will not reasonably assure the appearance of the defendant as required. In the event such a determination is made, the judicial officer shall, either in lieu of or in addition to the above methods of release, impose the first condition of release listed below which will reasonably assure the appearance of the person for trial. If no single condition gives that assurance, any combination of conditions may be used.)

Part II—Conditions of Release

Upon finding that release by one of the above methods will not by itself reasonably assure the appearance of the defendant, it is hereby FURTHER ORDERED that the defendant be released on the condition(s) checked below:

rd Party tody ( ) (1) The defendant is placed in the custody of
(Name of person or organization) _____
(Address) _____
(City and State) _____ Tel. No. _____
who agrees (a) to supervise the defendant in accordance with conditions 2 and 5 as checked below, (b) to use every effort to assure the appearance of the defendant at all scheduled hearings before the United States Magistrate or Court, and (c) to notify the Magistrate or Court immediately in the event the defendant violates any condition of his release or disappears.

Signed: _____
Custodian or Proxy

trictions on wel, Associa- or Place Abode (X) (2) The defendant will comply with each of the following conditions: The defendant shall not depart the Western District of Pennsylvania.

Deposit ( ) (3) The defendant will execute a bond binding himself to pay to the United States the sum of _____ dollars ($) and will deposit in the registry of the court the sum of _____ dollars ($), in _____ (cash or security), being not more than 10% of the amount of the bond, such deposit to be returned upon the court's determination that the defendant has performed the conditions of his release.

Surety (X) (4) The defendant will execute a bond in the amount of 30,000 dollars ($30000) either secured by the undertakings of sufficient solvent sureties or by the deposit of an equal amount of cash or other security in lieu thereof.

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AO 199—Sheet 2

Part-time Release

( ) (5) (a) The defendant will be released from ..... a.m./p.m. to ..... a.m./p.m. on _____ (Specify days of week) on condition that he return to custody at the specified time at such place of confinement as the United States Marshal shall designate.

Other Conditions

(x) (5) (b) The defendant agrees that he will comply with the following other conditions of release: .... Defendant shall not directly or indirectly ..... attempt to contact Francisconi, Stanizzo, Moody, Pastore, Harmer, Houdich or any other potential government witness.....

NOTE: A defendant for whom conditions of release are imposed and who after twenty-four hours from the time of the release hearing continues to be detained as a result of his inability to meet the conditions of release, shall, upon application, be entitled to have the conditions reviewed by the judicial officer who imposed them.)

Part III.—Appearance and Penalties

Appearance

It is hereby FURTHER ORDERED that the defendant shall appear next at the U. Dist. Court, Western Pa. at Pittsburgh March 10, 1975 at 10 a.m. for arraignment 502-L U.S.P.O. & Courthouse (Place) (Date and Time) and at such other places and times as the United States Magistrate or Court may order or direct.

Penalties

If the defendant violates any condition of his release, a warrant for his arrest will issue immediately. After arrest, the terms and conditions of any further release will be redetermined.

If the defendant fails to appear before any court or judicial officer as required, an additional criminal case may be instituted against him. If the failure to appear is in connection with a charge of felony, or while awaiting sentence, or pending appeal or certiorari after conviction, the penalty is a fine of not more than $5,000 or imprisonment for not more than five years, or both; if he fails to appear after being released on a misdemeanor charge, the penalty is a fine of not more than the maximum provided for the misdemeanor or imprisonment for not more than one year, or both.

Part IV.—Acknowledgment by Defendant

Acknowledgment

I _____ (Defendant) understand the methods and conditions of my release which have been checked above and the penalties and forfeitures applicable in the event I violate any condition or fail to appear as required.

I agree to comply fully with each of the obligations imposed on my release and to notify the Magistrate or Court promptly in the event I change the address indicated below.

J. L. Ferguson
(Defendant)
107 Tyndale Dr.
(Address)
McMurray Pa. 941[illegible]
City and State Tel No

Leland C. Houston
(United States Magistrate)
XXXXXXXXXXXXXXXX

RELEASE ORDERED:

Date: March 3, 1975

Counties in the Commonwealth of Pennsylvania Within the Jurisdiction of the United States District Court for the Western District of Pennsylvania

Allegheny
Armstrong
Beaver
Bedford
Blair
Butler
Cambria
Clarion
Clearfield
Crawford
Elk
Erie
Fayette
Forest
Greene
Indiana
Jefferson
Lawrence
McKean
Mercer
Somerset
Venango
Warren
Washington
Westmoreland

U.S. DEPARTMENT OF JUSTICE

Organized Crime and Racketeering Section
Suite 816 Chatham Center Office Building
Pittsburgh, Pennsylvania 15219

June 30, 1975

Bernhard Schaffler, Clerk
U. S. District Court
827 U. S. Post Office & Courthouse
7th & Grant Streets
Pittsburgh, Pennsylvania 15219

Re: United States of America v.
John Bazzano, Jr., et al.
No. 75-85 Criminal

Dear Mr. Schaffler:

Please be advised that the bonds listed below posted before Magistrate Robert C. Mitchell, United States Magistrate, by the defendants on March 10, 1975, at No. 75-85 Criminal should be transferred to No. 75-192 Criminal.

1. John Bazzano, Jr.
$30,000 Surety

2. Joseph DeMarco
$20,000 Surety

3. Joseph Charles Yimin
$10,000 O.R.

4. Charles Patrick Kellington
$10,000 Surety

5. Francis Dattalo
$10,000 Surety

Bernhard Schaffler, Clerk
Page - 2 -
June 30, 1975

6. Attilio Policastro
$10,000 O.R.

7. Primo Victor Mollica
$10,000 O.R.

Very truly yours,

JAMES E. ROARK
Special Attorney

JER:las

cc: All defendants
Harold Gondelman, Esquire
Vincent C. Murovich, Jr., Esquire
Leonard I. Sharon, Esquire
Michael W. Zurat, Esquire
John L. Doherty, Esquire
Bruce Carsia, Esquire

Supreme Court, U. S.
FILED
MAY 3 1978
MICHAEL RODAK, JR., CLERK

Nos. 77-1169, 77-6097 and 77-6236

In the Supreme Court of the United States

OCTOBER TERM, 1977

JOHN BAZZANO, PETITIONER

v.

UNITED STATES OF AMERICA

DAVID RANKIN GUFFEY, PETITIONER

v.

UNITED STATES OF AMERICA

JOHN FRANKLIN MATZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,

BENJAMIN R. CIVILETTI,
Assistant Attorney General,

JOSEPH S. DAVIES, JR.,
ALAN J. SOBOL,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

INDEX

	Page
Opinions below	2
Jurisdiction	2
Questions presented	2
Statement	3
Argument	6
Conclusion	21

CITATIONS

Cases:

Blumenthal v. *United States*, 332 U.S. 539	9
Brady v. *Maryland*, 373 U.S. 83	6, 7
Bruton v. *United States*, 391 U.S. 123	17
Donnelly v. *United States*, 228 U.S. 243	17
Geders v. *United States*, 425 U.S. 80	12
Handley v. *United States*, 416 F. 2d 1160	15
Hoffa v. *United States*, 385 U.S. 293	12
Reyes v. *Wyeth Laboratories*, 498 F. 2d 1264, certiorari denied, 419 U.S. 1096	15
Ungar v. *Sarafite*, 376 U.S. 575	19
United States v. *Agurs*, 427 U.S. 97	7, 8
United States v. *Dotson*, 546 F. 2d 1151	7, 8
United States v. *Evanchik*, 413 F. 2d 950	8, 9
United States v. *Fendley*, 522 F. 2d 181	14
United States v. *Harris*, 409 F. 2d 77, certiorari denied *sub nom. Brown* v. *United States*, 396 U.S. 965	8
United States v. *Jones*, 554 F. 2d 251, certiorari denied, October 3, 1977 (No. 77-5102)	15

Cases—Continued — Page

United States v. *Kelley*, 349 F. 2d 720 — 20
United States v. *Leal*, 509 F. 2d 122 — 15
United States v. *Mardian*, 546 F. 2d 973 — 20
United States v. *Rosen*, 353 F. 2d 523, certiorari denied, 383 U.S. 908 — 11
United States v. *Sand*, 541 F. 2d 1370, certiorari denied *sub nom. Scully* v. *United States*, 429 U.S. 1103 — 14, 15
United States v. *Scott*, 524 F. 2d 465 — 7
United States v. *Smith*, 548 F. 2d 545, certiorari denied, 431 U.S. 959 — 19
United States v. *Socony-Vacuum Oil Co.*, 310 U.S. 150 — 11

Constitution, statutes and rules:

United States Constitution, Sixth Amendment — 15
Jencks Act, 18 U.S.C. 3500 — 6
18 U.S.C. 2 — 3
18 U.S.C. 1511 — 3
18 U.S.C. 1955 — 3
18 U.S.C. 1961 — 4
18 U.S.C. 3500(a) — 8
28 U.S.C. 1732 — 13, 15
28 U.S.C. 1732(a) — 13
Fed. R. Crim. P.:
Rule 6(e) — 10, 11, 12
Rule 8 — 20
Rule 33 — 6
Fed. R. Evid.:
Rule 403 — 12
Rule 803(6) — 13, 15
Rule 804(b)(3) — 16, 18
Rule 806 — 17, 18

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1169

JOHN BAZZANO, PETITIONER

v.

UNITED STATES OF AMERICA

No. 77-6097

DAVID RANKIN GUFFEY, PETITIONER

v.

UNITED STATES OF AMERICA

No. 77-6236

JOHN FRANKLIN MATZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A)[1] and the opinion of the district court (Pet. App. D) are not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on December 21, 1977. The petitions for a writ of certiorari in Nos. 77-6097 and 77-6236 were filed on January 24, 1978, and February 21, 1978, respectively, and are therefore out of time under Rule 22(2) of the Rules of this Court. A timely petition for rehearing in No. 77-1169 was denied on January 24, 1978 (Pet. App. 35a-36a), and the petition for a writ of certiorari was filed on February 17, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the district court erred in denying petitioner Bazzano's post-trial motion for the court to inspect the government's files to determine whether the government violated its obligations to disclose exculpatory material.

2. Whether the district court erred in failing to grant a mistrial or to suppress the testimony of government witnesses on the ground that an FBI agent read to those witnesses each other's grand jury testi-

[1] Unless otherwise designated, "Pet. App." refers to the appendix to the petition in No. 77-1169.

mony prior to their testifying at trial, allegedly in violation of Fed. R. Crim. P. 6(e) (petitioners Guffey and Matz).

3. Whether the admission into evidence of adding machine tapes as business records violated Fed. R. Evid. 803(6) and 28 U.S.C. 1732(a) or petitioners' right of confrontation (petitioners Guffey and Matz).

4. Whether the evidence was sufficient to sustain petitioner Guffey's convictions.

5. Whether the admission of statements of a deceased co-conspirator violated petitioner Matz's right of confrontation.

6. Whether petitioner Matz was deprived of effective assistance of counsel by the trial court's denial of his motion for a continuance.

7. Whether the district court committed reversible error in refusing to sever petitioner Matz's trial from that of his co-defendants.

STATEMENT

Following a jury trial in the United States District Court for the Western District of Pennsylvania, petitioners were convicted of operating an illegal gambling business, in violation of 18 U.S.C. 2 and 1955, and conspiring to obstruct state law enforcement relating to gambling, in violation of 18 U.S.C. 1511.[2]

[2] Co-defendants John Regis Ward, Peter Paul Orsini, and Thomas Poljak were also convicted of conducting an illegal gambling operation and conspiring to obstruct state law enforcement, in violation of 18 U.S.C. 2, 1955, and 1511. Co-defendants Joseph De Marco, Joseph Charles Yimin, Charles

Petitioner Bazzano was sentenced to seven years' imprisonment and a fine of $40,000. Petitioner Guffey was sentenced to four years' imprisonment and a fine of $15,000, with the provision that he be eligible for parole after six months' imprisonment. Petitioner Matz was sentenced to four years' imprisonment and a fine of $15,000.

The evidence adduced at trial is fully set forth in the opinion of the court of appeals. In sum, it showed that petitioner Bazzano operated a lottery (or "numbers game") in the towns of Clairton and Elizabeth, Pennsylvania. All the defendants who participated in the gambling business, except Bazzano, were public officials. These officials, including petitioners Guffey, Chief of Police of Clairton, and Matz, Mayor of Clairton,[1] accepted payments from the gambling operation in exchange for allowing the operation to continue without interference (Pet. App. 4a-5a).

The illegal gambling activities were extensively detailed at trial by Elizabeth Stanizzo, a former employee of the numbers business whose duties included receiving and recording the bets. Stanizzo had known Bazzano for 20 years, and her late husband had been Bazzano's partner in the business. She testified that

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[1] Patrick Kellington, Francis Dattalo, Attilio Policastro, and Primo Victory Mollica pleaded guilty to the gambling and conspiracy charges and to conducting an enterprise by a pattern of racketeering activity, in violation of 18 U.S.C. 1961 *et seq.* Co-defendants Dominic Paul Serapiglia and George B. Hines were acquitted by the jury.

Bazzano ran the gambling operation, and the other defendants received payments from the operation (IX Tr. 170-195). Stanizzo further testified to a meeting, attended by her and her husband, petitioners Bazzano and Matz, and Gary Pastore, another employee of the gambling business, to determine who would "get" the numbers business in Clairton (IX Tr. 177-179). She also testified to having driven her husband on one occasion to deliver $1,500 to petitioner Matz (IX Tr. 180).

Stanizzo's testimony was corroborated by Andrew Moody, who owned part of the operation. Moody, whose daily duties included preparing summary tapes of bets and collecting bets from many numbers writers, testified that he had worked for Stanizzo's late husband in the gambling business. He related that each week, after he prepared the summary tapes of the week's numbers, he delivered them to Mr. Stanizzo (IX Tr. 69-77); that testimony corroborated Mrs. Stanizzo's testimony that each week, petitioner Bazzano would collect the weekly proceeds, review the weekly summary tapes with Mr. Stanizzo, pay Mr. Stanizzo, and take the remainder of the cash (IX Tr. 176-178). A former county detective, John Hammer, who related that he had accepted protection payments from numbers writers in the Clairton area, also corroborated Mrs. Stanizzo's testimony (VIII Tr. 26-40, 53-57).

The evidence also included adding machine tapes prepared by Moody, showing payments made to Matz and other defendants, including two notations show-

ing $150 payments to "Chief, Clairton," who at that time was petitioner Guffey (IX Tr. 115). In addition, the evidence showed that no gambling arrests were made in Clairton during the four-year period alleged in the indictment (VII Tr. 706).

ARGUMENT

1. Petitioner Bazzano's sole contention (Pet. 3) is that the district court improperly denied his post-trial request that the court inspect the prosecution's files to determine whether it had violated its obligations under *Brady* v. *Maryland*, 373 U.S. 83, by failing to provide him with exculpatory statements and grand jury testimony of persons subpoenaed as government witnesses but not called to testify at trial.

Prior to trial Bazzano asked for "all exculpatory material" in the government's possession (Pet. 6). The government represented that it had no such material (Pet. App. 50a). At trial, following the direct testimony of each government witness, his or her prior statements were furnished to defense counsel in accordance with the requirements of the Jencks Act, 18 U.S.C. 3500. After his conviction, petitioner Bazzano moved for a new trial under Fed. R. Crim. P. 33 on the ground that some of the statements and grand jury testimony furnished him as Jencks material was allegedly exculpatory and arguing that this indicated that the government had failed to disclose other exculpatory statements of persons who had been subpoenaed as grand jury witnesses but not called to testify. In his motion for a new trial, petitioner requested the district court to conduct a hearing on the matter and to examine the government's files and determine whether such exculpatory material existed (Pet. 7). The government again represented that it possessed no exculpatory material, and the district court denied the motion (Pet. App. 50a).

The courts below correctly rejected petitioner's motion for a new trial and his requests that the district court conduct a hearing and search all of the government's files, presumably *in camera*, for exculpatory material. As this Court has recognized, *Brady* is not a discovery device. *United States* v. *Agurs*, 427 U.S. 97, 107; see also *United States* v. *Dotson*, 546 F. 2d 1151, 1153 (C.A. 5); *United States* v. *Scott*, 524 F. 2d 465, 467 (C.A. 5). *Brady* may require reversal of a conviction when it is ascertained, after trial, that the prosecution in fact possessed exculpatory information that it had a duty to disclose,[3] but *Brady* does not permit a defendant, either before or after trial, to search the prosecution's files in the hopes of discovering exculpatory material and thereby assisting the defense or establishing a *Brady* violation. And, as the courts of appeals have uniformly held, *Brady* does not require the trial court to examine the prosecution's files *in camera* unless the defendant has made some particularized showing—beyond a conclusory allegation—that the prosecution in fact

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[3] As the Court stated in *Agurs*, *supra*, 427 U.S. at 103: "The rule of *Brady* v. *Maryland*, 373 U.S. 83 * * * involves the discovery, after trial, of information which had been known to the prosecution but unknown to the defense."

possesses information that it had an obligation under *Brady* to disclose. See, *e.g.*, *United States* v. *Dotson*, *supra*; *United States* v. *Harris*, 409 F. 2d 77, 80-81 (C.A. 4), certiorari denied *sub nom. Brown* v. *United States*, 396 U.S. 965; *United States* v. *Evanchik*, 413 F. 2d 950, 953 (C.A. 2).

Petitioner Bazzano made no such showing. His allegation that the prosecution's file contained exculpatory statements is based entirely on the claim that statements disclosed to him under the Jencks Act were exculpatory and the argument that it may therefore be presumed that other undisclosed statements are also exculpatory. In the first place, however, the Jencks Act statements cited by petitioner are hardly exculpatory.[4] The sole statement referred to in the petition (Pet. 13) is the grand jury testimony of government witness Hammer to the effect that Hammer had once asked Mr. Stanizzo to ask Bazzano to lend Hammer some money and that several days later Mr. Stanizzo relayed a rejection of that request to Hammer, saying "John [Bazzano] said he is not in the business" (VIII Tr. 48). In context, since Bazzano was charged with gambling offenses, that statement has little, if any exculpatory value.[5]

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[4] There was, of course, no obligation to disclose those statements until the witnesses testified at trial, even if they had been exculpatory. See 18 U.S.C. 3500(a); *United States* v. *Agurs*, *supra*, 427 U.S. at 112 n.20.

[5] In his brief below, Bazzano cited several other instances of what he claims to be exculpatory material furnished to him under the Jencks Act. These instances included a statement by co-conspirator Mandich to the FBI that he never worked for Bazzano; a statement by Petrulli before the jury that he never talked to Bazzano about the Clairton numbers business; and a statement by co-conspirator Sevcik to the FBI that he had no dealings with Bazzano. See Bazzano's Br. 6-7. In the circumstances of this case, those statements were hardly exculpatory. The indictment charged twelve defendants (six of whom pleaded guilty) with conducting the gambling business that Bazzano was also charged with operating, and the proof established that there were numerous other uncharged participants in the business and in the alleged conspiracy to obstruct state law, including Mandich, Petrulli and Sevcik. The fact (if true) that three of the co-conspirators did not personally have dealings with Bazzano would not establish any defense to the charges. Cf. *Blumenthal* v. *United States*, 332 U.S. 539, 559.

Moreover, even if the Jencks Act statements had been exculpatory, that would not constitute a showing that the prosecutor, contrary to his representation, possessed other exculpatory statements, and thus it would not require the district court to conduct a hearing on the matter or examine the prosecution's files itself. As the court of appeals stated in *United States* v. *Evanchik*, *supra*, 413 F. 2d at 953:

> [T]he assurance by the government that it has in its possession no undisclosed evidence that would tend to exculpate defendant justifies the denial of a motion for inspection that does not make some particularized showing of materiality and usefulness.

2. Petitioners Guffey (Pet. No. 77-6097, pp. 10-14) and Matz (Pet. No. 77-6236, pp. 4-6) challenge the district court's denial of their motions for a mistrial because government witnesses Moody and Stan-

izzo were allegedly read each other's grand jury testimony by the principal FBI agent who investigated the case, allegedly in violation of Fed. R. Crim. P. 6(e). The court of appeals and the district court correctly rejected that contention (Pet. App. 5a-13a, 49a).

The record shows that when Moody, who was testifying under a grant of immunity, took the stand, he asked to speak with the judge in chambers. There, with defense counsel present, Moody stated that a few days before he was to testify, FBI agent Fitzpatrick had read Moody's grand jury testimony to Stanizzo and read Stanizzo's grand jury testimony to Moody. Defense counsel moved for a mistrial or, in the alternative, that both Moody and Stanizzo "be dismissed as witnesses and not be called by the Government" (IX Tr. 63). The court denied the motions after oral argument, and Moody was allowed to testify.

On cross-examination, Moody testified that Fitzpatrick read selected pages of each witness's grand jury testimony in the presence of both witnesses (IX Tr. 133). He also testified that, in his opinion, Fitzpatrick attempted to influence his trial testimony with Stanizzo's grand jury testimony by attempting to insure that their stories would be the same (IX Tr. 133-134). Stanizzo's account differed from Moody's. She testified at trial that Fitzpatrick did not read any of her grand jury testimony at the meeting but, rather, told her that he did not have to read it to her because she knew what she had said.

She did, however, testify that he read from "some papers" to Moody in her presence.[6] After Stanizzo testified, petitioners again moved that her testimony be stricken on the ground that the meeting with Fitzpatrick violated Fed. R. Crim. P. 6(e)[7] and constituted prosecutorial misconduct. Petitioners also moved for a dismissal of the indictment on the same grounds. These motions were denied.

Assuming that the FBI agent disclosed Moody's and Stanizzo's grand jury testimony to each other in violation of Rule 6(e), the courts below correctly held that the admission of their trial testimony was not error. As the court of appeals noted (Pet. App. 9a), the principal purpose of Rule 6(e) is "to encourage witnesses to testify without fear of retaliation."[8] Another significant purpose is to prevent public dissemination of materials when no criminal

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[6] Fitzpatrick testified that he "went over" Moody's testimony with him in Stanizzo's presence and "went over" Stanizzo's testimony with her in Moody's presence (X Tr. 45).

[7] That rule provides in pertinent part:

> Disclosure of matters occurring before the grand jury * * * may be made to the attorneys for the government for use in the performance of their duties. Otherwise * * * [an] attorney * * * may disclose matters * * * only when so directed by the court * * *.

[8] Accordingly, it has generally been held that the prosecutor may disclose a witness's grand jury testimony to the witness himself for purposes of refreshing his recollection. See *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 233; *United States* v. *Rosen*, 353 F. 2d 523, 524 (C.A. 2), certiorari denied, 383 U.S. 908.

charges result from the grand jury's investigation. Since the objectives of Rule 6(e) relate to the integrity of the grand jury's proceedings and not to the trial itself, it follows that a violation of the Rule supplies no basis for suppression of a witness's trial testimony. Accordingly, it is not surprising that there have been no cases applying the suppression remedy to disclosures of grand jury testimony in violation of the Rule.

Thus, the prosecution's alleged use of grand jury testimony to "shape" a witness' trial testimony does not implicate Rule 6(e), as petitioners contend, but rather involves the general ethical prohibitions against coaching witnesses. While there may conceivably be circumstances where evidence of improper coaching would warrant the district court's suppression of a witness's trial testimony under Fed. R. Evid. 403, the general rule is that evidence of coaching affects the credibility, not the admissibility, of testimony, and is a matter for the jury to resolve. See *Geders* v. *United States*, 425 U.S. 80, 89-90; *Hoffa* v. *United States*, 385 U.S. 293, 311.

The circumstances of this case demonstrate that the district court correctly declined to suppress Stanizzo's testimony and correctly permitted the jury to weigh the evidence of the alleged coaching for its bearing on her credibility. First, as the court of appeals noted (Pet. App. 11a), the record reflects that Moody was hostile to the government and "was using this incident as a convenient way to avoid testifying and to avoid implicating his friends." Second, as the

district court found, the testimony of Moody and Stanizzo about the incident varied significantly, and "all the circumstances militate against any inference that the testimony of Moody and Mrs. Stanizzo was 'shaped' * * *" (Pet. App. 49a-50a). Third, all of the circumstances concerning the incident were presented at length to the jury on cross-examination. Finally, as the court of appeals noted (Pet. App. 13a), the admission of Stanizzo's testimony was unlikely to have significantly prejudiced petitioner Matz (she did not testify about petitioner Guffey), since there was ample independent evidence of Matz's involvement in the operation.

3. Petitioners Guffey (Pet. No. 77-6097, pp. 4-8) and Matz (Pet. No. 77-6236, pp. 7-8) assert that the gambling business's adding machine tapes were not admissible as "business records" pursuant to Rule 803(6), Fed. R. Evid. and 28 U.S.C. 1732(a), the Business Records Act, and that their admission violated petitioners' right of confrontation.

a. There is no merit to petitioners' contention that the tapes were inadmissible under Rule 803(6) or 28 U.S.C. 1732(a) because Moody, who prepared them on the basis of information supplied to him by his employer, Mr. Stanizzo, claimed to lack personal knowledge of the underlying facts on which the information was based. Neither Rule 803(6) nor 28 U.S.C. 1732 specifies that a business record is admissible only if the person making the record has personal knowledge of the facts on which the record is based. Rule 803(6) requires only that the record

be "made at or near the time by, *or from* information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the * * * record" (emphasis supplied). See, *e.g.*, *United States* v. *Sand*, 541 F. 2d 1370, 1377 (C.A. 9), certiorari denied *sub nom. Scully* v. *United States*, 429 U.S. 1103; *United States* v. *Fendley*, 522 F. 2d 181, 184-185 (C.A. 5).

Those requirements were satisfied in this case. The evidence showed that Moody was part of the gambling operation and that his duties included preparing daily summary or composite tapes that listed the bets placed that day and disclosed the actual payments made to the public officials involved. Moody compiled a weekly master tape that contained notations about net cash coming in and expenses being paid out (IX Tr. 69-70). He made the notations on the tapes based on information supplied to him by Mr. Stanizzo, Bazzano's business partner in the gambling operation and Moody's superior (IX Tr. 71, 156; Pet. App. 42a-43a). Weekly, Moody delivered his master tapes and all money collected to Mr. Stanizzo; petitioner Bazzano would then collect the money and review the tapes (IX Tr. 76-77, 176-177). As a government expert in gambling operations testified, Moody's adding machine tapes were similar to records kept by other numbers operations (VIII Tr. 72-95). This evidence regarding Moody's daily and weekly compilation of the tapes and Mr. Stanizzo's and Bazzano's weekly review of them established an adequate foundation

for their admission under both 28 U.S.C. 1732 and Rule 803(6). See *United States* v. *Jones*, 554 F. 2d 251, 252 (C.A. 5), certiorari denied, October 3, 1977 (No. 77-5102); *Reyes* v. *Wyeth Laboratories*, 498 F. 2d 1264, 1287 (C.A. 5), certiorari denied, 419 U.S. 1096.

b. There is no substance to petitioners' claim (Pet. No. 77-6097, pp. 4, 7-8; Pet. No. 77-6236, pp. 7-8), that the admission of the adding machine tapes violated their Sixth Amendment right of confrontation. It is well established that the admission of documents under the business records exception to the hearsay rule does not violate the Confrontation Clause. *United States* v. *Sand*, *supra*, 541 F. 2d at 1377; *United States* v. *Leal*, 509 F. 2d 122, 127 (C.A. 9); *Hanley* v. *United States*, 416 F. 2d 1160, 1167-1168 (C.A. 5).

4. Petitioner Guffey contends (Pet. No. 77-6097, pp. 8-10) that the evidence adduced at trial was insufficient to support his conviction. As noted in the Statement, however, the evidence at trial showed that during the four-year period alleged in the indictment, when petitioner Guffey was the Chief of Police of Clairton, no gambling arrests were made in Clairton, notwithstanding the demonstrated existence of a large gambling business whose operation was known to and protected by a number of public officials, including petitioner Matz (the Mayor of Clairton) and government witness Hammer, a county detective. In addition, the business records of the operation showed two payments of $150 to "Chief, Clairton." That evidence was sufficient to submit the issue of petitioner

Guffey's guilt to a jury, and the issue does not warrant review in this Court.

5. Petitioner Matz contends (Pet. No. 77-6236, pp. 8-10) that the admission of a statement that his deceased co-conspirator and confederate, Gary Pastore, made to FBI agent Fitzpatrick violated Matz' right of confrontation.

The record shows that the admission of the statements was not reversible error. On direct examination, Fitzpatrick testified that Pastore admitted being involved with Moody and Mr. Stanizzo "in the money end of the business, the collections and the payments of expenses," but Fitzpatrick made no reference to any payments to any defendants (X Tr. 43).[9] On cross-examination, counsel for petitioner Bazzano, attempting to impeach Pastore's credibility, questioned Fitzpatrick about an apparent inconsistency between the adding machine tapes, which indicated that Hammer received $150 per month, and a statement made by Pastore to Fitzpatrick, reflected in Fitzpatrick's interview notes, that Hammer received only $100 a month (X Tr. 44-47). Defense counsel then attempted to establish a motive for Pastore's statement to Fitzpatrick by suggesting that Pastore had made

[9] This testimony was introduced to corroborate other testimony by Moody, Stanizzo and others that Pastore had been involved in the collection and payment of expenses, and was admitted under Fed. R. Evid. 804(b)(3) as a statement by an unavailable (deceased) declarant that "so far tended to subject him to * * * criminal liability * * * that a reasonable man * * * would not have made the statement unless he believed it to be true" (X Tr. 37-42; Pet. App. 47a, n. 5).

a deal with the FBI and that as a result he would not be indicted (X Tr. 47-49). On redirect, the prosecutor, over Matz's objection, attempted to rehabilitate Pastore by showing he had made other statements consistent with the tape entries, one of which was that Pastore told Fitzpatrick that he paid Matz $1,500 per month.[10] The court admitted this evidence on the basis of Fed. R. Evid. 806, which provides that when the credibility of a declarant is attacked, that credibility may in turn "be supported, by any evidence that would be admissible for those purposes if the declarant testified as a witness."

Petitioner relies on *Bruton* v. *United States*, 391 U.S. 123, for his claim that the admission of Pastore's statements violated his right to confrontation. *Bruton* involved the confession of a co-defendant who refused to testify, which implicated both the co-defendant and Bruton and which the prosecution introduced in its direct case; it did not involve the statement of a deceased declarant which was introduced for the limited purpose, authorized by Rule 806, of rehabilitating the credibility of a declarant that the defense had attacked on cross-examination.[11] More-

[10] This answer was also consistent with notations made of payments to the "Mayor" of Clairton (Matz) and with Stanizzo's earlier testimony that her husband had paid Matz $1,500 (IX Tr. 108, 179-180).

[11] When *Bruton* was decided, federal law was clear that out-of-court statements against penal interests did not qualify for admission as an exception to the hearsay rule. *Donnelly* v. *United States*, 228 U.S. 243, 273. The Court therefore assumed that the confession was inadmissible against Bruton, and the

over, the statement at issue here was merely cumulative of other evidence establishing payments to Matz, including the notations on the tapes and the testimony of Stanizzo that her husband had paid Matz $1,500 and that she had been present at a meeting with Matz to determine who would have the gambling business in Clairton. Under the circumstances the additional admission of Pastore's statement, even if error, was harmless.

6. Petitioner Matz contends (Pet. No. 77-6236, pp. 10-11) that the trial court's refusal to grant him a continuance deprived him of effective assistance of counsel, because, he claims, a continuance was necessary in order to allow counsel to secure "expert evaluation of the prosecution exhibits and expert testimony concerning these exhibits" (*id.* at 11). The record is to the contrary. On March 8, 1976, the date set for the commencement of trial, the court was informed that Mr. Sullivan, appointed as petitioner's counsel on July 2, 1975, was hospitalized and uncertain about when he could resume petitioner's defense. Joseph Bonistalli was substituted

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opinion focused principally not on the admissibility of the confession but on the efficacy of a limiting instruction. It is an open question whether the evidentiary assumption in *Bruton* has been affected by Rule 804(b)(3), which recognizes certain statements against penal interests as an exception to the hearsay rule. That question is not presented in this case because the challenged statement was admitted under Rule 806, not Rule 804(b)(3), and because the admission of the statement was in any event harmless.

as counsel, and the selection of the jury was postponed until March 9, 1976 (Pet. App. 51a). As the district court noted (*ibid.*), it was not until March 23, 1976, that any evidence was introduced at the trial linking Matz to the gambling business. Thus, the record plainly contradicts petitioner's contention that the late substitution of counsel prevented him from securing expert testimony. See, *e.g.*, *United States* v. *Smith*, 548 F. 2d 545, 548 (C.A. 5), certiorari denied, 431 U.S. 959.[12]

In any event, motions for a continuance are matters within the sound discretion of the district court, and its decision is reversible only upon a showing of an abuse of discretion. *E.g.*, *Ungar* v. *Sarafite*, 376 U.S. 575, 588-591. Petitioner has cited no errors or inadequacies in his trial counsel's performance, and, as the district court found (Pet. App. 51a-52a) and petitioner concedes (Pet. No. 77-6232, pp. 11), "Mr. Bonistalli vigorously cross-examined government witnesses and otherwise actively participated in the proceedings." Accordingly, the district court was well within its discretion in denying petitioner's motion for a continuance.

7. Finally, there is no merit to petitioner Matz's contention (Pet. No. 77-6232, pp. 10, 11-12) that the trial court erred in denying his motion for a separate

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[12] Alternatively, Matz contends (Pet. 11) that the district court should have granted his motion for a severance, proceeded with the trial of his co-defendants, and tried him later. As noted above, the record refutes any need for either a continuance or severance.

trial. Matz alleges that the disparity between the evidence against him and the evidence against the other defendants was so great that he was necessarily prejudiced by being tried together with his co-defendants.[13] As noted, the evidence showed that petitioner Matz, who was the Mayor of Clairton, participated in a meeting with Bazzano, the Stanizzos, and Pastore wherein it was decided that the gambling operation would be allowed to continue in Clairton without official interference in exchange for payments; that he received a $1,500 payment in the summer of 1972 from Mr. Stanizzo; and that he was listed on the business tapes of the gambling operation as receiving $1,500 per month. Petitioner Matz was thus not simply a marginal figure in the criminal scheme; he was one of a small core group that allowed Bazzano to operate freely in Clairton. Accordingly, this case is clearly distinguishable from *United States* v. *Kelley*, 349 F. 2d 720, 756-759 (C.A. 2), and *United States* v. *Mardian*, 546 F. 2d 973 (C.A. D.C.), upon which petitioner relies (Pet. No. 77-6236, p. 11), which held that severance should have been granted because a very thin case against one defendant was unfairly bolstered by "spill-over" from the proof against much more clearly culpable defendants.

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[13] Petitioner Matz does not dispute that joinder of the defendants in this case was proper under the terms of Fed. R. Crim. P. 8(b), which allows joinder of co-defendants "if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses."

CONCLUSION

It is therefore respectfully submitted that the petitions for a writ of certiorari should be denied.

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